

# **EXHIBIT 1**

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-cgm

4 Adv. Case No. 08-01789-cgm

5 - - - - - x

6 In the Matter of:

7

8 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

9

10 Debtor.

11 - - - - - x

12 Securities Investor Protection Corporation,

13 Plaintiff,

14 v.

15 Bernard L. Madoff Investment Securities, LLC, et al.,

16 Defendants.

17 - - - - - x

18 Adv. Case No. 10-03622-cgm

19 - - - - - x

20 Fairfield Sentry Limited (In Liquidation), et al.,

21 Plaintiffs,

22 v.

23 Citibank NA London, et al.,

24 Defendants.

25 - - - - - x

1 Adv. Case No. 10-04468-cgm

2 - - - - - x

3 Irving H. Picard, Trustee for the Liquidation of Bernard L.

4 Madoff Investment Securities, LLC,

5 Plaintiff,

6 v.

7 Ken-Wen Family Limited Partnership, et al.,

8 Defendants.

9 - - - - - x

10 Adv. Case No. 10-04468-cgm

11 - - - - - x

12 Irving H. Picard, Trustee for the Liquidation of Bernard L.

13 Madoff Investment Securities, LLC,

14 Plaintiff,

15 v.

16 Fairfield Pagma Associates, LP, a

17 New York limited,

18 Defendant.

19 - - - - - x

20 United States Bankruptcy Court

21 One Bowling Green

22 New York, NY 10004

23

24 February 16, 2022

25 10:00 AM

1 B E F O R E :

2 HON CHIEF JUDGE CECELIA G. MORRIS

3 U.S. BANKRUPTCY JUDGE

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1 HEARING re 10-05169-cgm Doc# 94 Motion for Summary Judgment  
2 /Notice of Trustees Motion for Summary Judgment filed by  
3 David J. Sheehan on behalf of Irving H. Picard, Trustee for  
4 the Liquidation of Bernard L. Madoff Investment Securities  
5 LLC, and Bernard L. Madoff with hearing to be held on  
6 12/15/2021 at 10:00 AM at Videoconference (ZoomGov) (CGM) .  
7

8 HEARING re 10-05169-cgm Doc# 120 Notice of Adjournment of  
9 Hearing RE: Memorandum of Law in Opposition to Motion for  
10 Summary Judgement(related document(s)94) filed by Barry R.  
11 Lax on behalf of Bonnie Joyce Kansler; hearing held and  
12 adjourned to 2/16/2022 at 10:00 AM at Videoconference  
13 (ZoomGov) (CGM) .  
14

15 HEARING re 10-05169-cgm Doc# 121 Notice of Adjournment of  
16 Hearing RE: Opposition Counterstatement of Undisputed Fact  
17 (related document(s)94) filed by Barry R. Lax on behalf of  
18 Bonnie Joyce Kansler; hearing held and adjourned to  
19 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) .  
20

21 HEARING re 10-05169-cgm Doc# 122 Notice of Adjournment of  
22 Hearing RE: 112 Opposition Declaration of Adam Kansler  
23 (related document(s)94) filed by Barry R. Lax on behalf of  
24 Bonnie Joyce Kansler; hearing held and adjourned to  
25 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

1 HEARING re 10-05169-cgm Doc# 123 Notice of Adjournment of  
2 Hearing RE: Opposition Declaration of Bonne Joyce Kansler  
3 (related document(s) 94) filed by Barry R. Lax on behalf of  
4 Bonnie Joyce Kansler; hearing held and adjourned to  
5 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) .  
6

7 HEARING re 10-05169-cgm Doc# 124 Notice of Adjournment of  
8 Hearing RE: Opposition Declaration of Brian Neville (related  
9 document(s) 94) filed by Barry R. Lax on behalf of Bonnie  
10 Joyce Kansler; hearing held and adjourned to 2/16/2022 at  
11 10:00 AM at Videoconference (ZoomGov) (CGM) .  
12

13 HEARING re 10-05169-cgm Doc# 126 Notice of Adjournment of  
14 Hearing RE: Memorandum of Law/Trustees Reply Memorandum of  
15 Law in FurtherSupport of Motion for Summary Judgment filed  
16 by Nicholas Cremona on behalf of Irving H. Picard, Trustee  
17 for the Liquidation of Bernard L. Madoff Investment  
18 Securities LLC, and Bernard L. Madoff; hearing held and  
19 adjourned to 2/16/2022 at 10:00 AM at Videoconference  
20 (ZoomGov) (CGM) .  
21  
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1 HEARING re 10-05169-cgm Doc# 117 Statement/Trustee's  
2 Responses and Objections to Defendants' Statement of  
3 Additional Material Facts (related document(s)116) filed by  
4 Nicholas Cremona on behalf of Irving H. Picard, Trustee for  
5 the Liquidation of Bernard L. Madoff Investment Securities  
6 LLC, and Bernard L. Madoff  
7  
8 HEARING re 10-04468-cgm Doc# 194 Notice Of An Adjourned  
9 Hearing Re: Doc# 185 Notice of Hearing Regarding Notice of  
10 (I) Opposition to Defendant Kenneth W. Browns Motion for  
11 Summary Judgment, (II) Cross Motion for Summary Judgment as  
12 to Defendant Kenneth W. Brown, and (III) Motion for Summary  
13 Judgment as to Defendant Ken-Wen Family Limited Partnership  
14 (related document(s)178) filed by Matthew B. Lunn on behalf  
15 of Irving H. Picard, Trustee for the Liquidation of Bernard  
16 L. Madoff Investment Securities LLC, and Bernard L. Madoff  
17 with hearing to be held on 02/16/2022 at 09:00 AM at  
18 Videoconference (ZoomGov) (CGM)  
19  
20 HEARING re 10-04468-cgm Doc. #178 Motion for Summary  
21 Judgment // Notice of (I) Opposition to Defendant Kenneth W.  
22 Browns Motion for Summary Judgment, (II) Cross Motion for  
23 Summary Judgment as to Defendant Kenneth W. Brown, and (III)  
24 Motion for Summary Judgment as to Defendant Ken-Wen Family  
25 Limited Partnership (related document(s)174) filed by

1 Matthew B. Lunn on behalf of Irving H. Picard, Trustee for  
2 the Liquidation of Bernard L. Madoff Investment Securities  
3 LLC, and Bernard L. Madoff. Doc. #178 Motion for Summary  
4 Judgment // Notice of (I) Opposition to Defendant Kenneth W.  
5 Brown's Motion for Summary Judgment, (II) Cross Motion for  
6 Summary Judgment as to Defendant Kenneth W. Brown, and (III)  
7 Motion for Summary Judgment as to Defendant Ken-Wen Family  
8 Limited Partnership (related document(s)174) filed by  
9 Matthew B. Lunn on behalf of Irving H. Picard, Trustee for  
10 the Liquidation of Bernard L. Madoff Investment Securities  
11 LLC, and Bernard L. Madoff. (Lunn, Matthew)

12  
13 HEARING re 10-04468-cgm Doc# 195 Notice of An Adjourned  
14 Hearing Re: Doc# 178 Motion for Summary Judgment // Notice  
15 of (I) Opposition to Defendant Kenneth W. Browns Motion for  
16 Summary Judgment, (II) Cross Motion for Summary Judgment as  
17 to Defendant Kenneth W. Brown, and (III) Motion for Summary  
18 Judgment as to Defendant Ken-Wen Family Limited Partnership  
19 (related document(s)174) filed by Matthew B. Lunn on behalf  
20 of Irving H. Picard, Trustee for the Liquidation of Bernard  
21 L. Madoff Investment Securities LLC, and Bernard L. Madoff.  
22 (related document(s)178) with hearing to be held on  
23 2/16/2022 at 09:00 AM at Videoconference (ZoomGov) (CGM).

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25



1 HEARING re 10-04468-cgm Doc# 197 Notice of An Adjourned  
2 Hearing Re: Doc# 174 Motion for Summary Judgment filed by  
3 Mark S. Roher on behalf of Kenneth W. Brown, in his capacity  
4 as a General Partner of the Ken Wen Family Limited  
5 Partnership. with hearing to be held on 02/16/2022 at 09:00  
6 AM at(related document(s)174)at Videoconference (ZoomGov)  
7 (CGM) .

8  
9 HEARING re 10-04468-cgm Doc# 203 Reply to Motion and  
10 Response in Opposition to Cross Motion for Summary Judgment  
11 (related document(s)178) filed by Mark S. Roher on behalf of  
12 Kenneth W. Brown, in his capacity as a General Partner of  
13 the Ken Wen Family Limited Partnership.

14  
15 HEARING re 10-04468-cgm Doc# 204 Reply to Motion Notice of  
16 Filing Exhibits 7 through 11 to Reply [DE 203] filed by Mark  
17 S. Roher on behalf of Kenneth W. Brown, in his capacity as a  
18 General Partner of the Ken Wen Family Limited Partnership.

19  
20 HEARING re 10-04468-cgm Doc# 205 Reply Memorandum of Law in  
21 Further Support of Cross-Motion for Summary Judgment as to  
22 Defendant Kenneth W. Brown (related document(s)174, 178)  
23 filed by Matthew B. Lunn on behalf of Irving H. Picard,  
24 Trustee for the Liquidation of Bernard L. Madoff Investment  
25 Securities LLC, and Bernard L. Madoff.

1 A P P E A R A N C E S :

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7 BY: CHRISTOPHER C. LAMBE (TELEPHONICALLY)  
8 MICHAEL S. NEIBURG (TELEPHONICALLY)  
9

10 ALSO PRESENT TELEPHONICALLY:

11 KENNETH W. BROWN  
12 JEFF E. BUTLER  
13 JEFFREY C. FOURMAUX  
14 DIELAI YANG  
15 CARMINE BOCCUZZI  
16 MARC J. GOTTRIDGE  
17 KEVIN C. KELLY  
18 MARCELLA OLIVER  
19 UDAY GORREPATI  
20 NATHAN RICHARDSON  
21 JUSTIN DUDA  
22 ROXANNE M. EASTES  
23 JD COLAVECCHIO  
24 JOHN CRAIG  
25 JOSEPH M. KAY

1 BIANCA LIN  
2 RACHEL POLAN  
3 DAVID SHAIMAN  
4 ELIZABETH VICENS  
5 JOHN ZULACK  
6 LAUREN PINCUS  
7 ROBERT J. LACK

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone. Let me move  
3 some things around right here. This is Adversary Number 10-  
4 05169. I'm going to call them separately. And this is  
5 Irving Picard, Trustee for liquidation of BMLIS v. Fairfield  
6 Pagma Associates, Fairfax LLC, Seyfair LLC, Marjorie  
7 Kleinman, estate of Marjorie Kleinman, Bonnie Kansler,  
8 estate of Marjorie Kleinman, and Seymour Kleinman. And it  
9 is in the matter of 0899000. State your name and  
10 affiliation.

11 MR. CREMONA: Good morning, Your Honor. Nicholas  
12 Cremona of Baker and Hostetler, appearing on behalf of  
13 Irving Picard as Trustee.

14 MR. SHIFRIN: Good morning, Your Honor. Max  
15 Shifrin of Baker and Hostetler as well, appearing on behalf  
16 of the Trustee.

17 MR. LAX: Good morning, Your Honor. This is Barry  
18 Lax from Lax from Lax & Neville, appearing on behalf of the  
19 individual defendants, Marjorie and Seymour Kleinman and  
20 Bonnie Kansler as the executor of Marjorie Kleinman's  
21 estate.

22 THE COURT: Very good. Very good. It is a motion  
23 for summary judgment and a response.

24 Excuse me. Let me ask you, Mr. Lax, so you also  
25 represent the LLC?

1 MR. LAX: Well, the general partners, Your Honor.  
2 There is the Fairfield Pagma. They dissolved over a decade  
3 ago. And there's the LLC general partners. For the  
4 purposes of this motion, we don't contest their liability  
5 and we don't represent them per se, even though we did  
6 appear for them in the initial action, we've never formally  
7 withdrawn.

8 THE COURT: Let me -- so you're saying to me that  
9 judgement can be entered then against Fairfield Pagma and  
10 Seyfair and Fairfax LLCs?

11 MR. LAX: Yes, Your Honor.

12 THE COURT: Very good. Submit an order on those.  
13 Okay.

14 MR. LAX: Your Honor, you're saying the Plaintiffs  
15 to submit an order on that. Is that correct?

16 THE COURT: Correct.

17 MR. LAX: Okay, thank you.

18 THE COURT: Now then, so now then we have the  
19 other individuals in this case. Who is going to be arguing  
20 for the trustee?

21 MR. SHIFRIN: Good morning again, Your Honor. Max  
22 Shifrin on behalf of the Trustee.

23 THE COURT: So we are focusing on the general  
24 partners now?

25 MR. SHIFRIN: That's correct. Although we do

1 dispute some of the things Mr. Lax just said, we agree that  
2 the issue here is whether the judgement that the Court has  
3 already directed be entered should extend to the two general  
4 partners.

5 THE COURT: I understand that. But right now,  
6 that has been conceded, that's done, and we have that.  
7 Okay. So we're basically looking at, just so I'm clear,  
8 Marjorie Kleinman, the Estate of Marjorie Kleinman, Bonnie  
9 Kansler, Estate of Marjorie Kleinman, and Seymour Kleinman.

10 MR. SHIFRIN: Correct.

11 THE COURT: Okay. Very good. And this is your  
12 summary judgment motion.

13 MR. SHIFRIN: Correct.

14 THE COURT: Okay. Anything you wish to add to  
15 your papers?

16 MR. SHIFRIN: Yes, Your Honor. What I'd like to  
17 do here is amplify some of the things we actually say in our  
18 reply brief if that's okay with The Court. And we'll  
19 address some of the things Mr. Lax just said.

20 The issue indeed is whether the judgement that  
21 will be entered in favor of the initial transferee should  
22 extend to the two individual general partners. The  
23 Defendants concede that these two individuals, Seymour and  
24 Marjorie Kleinman, were in fact general partners of the  
25 initial transferee when the account was opened. However,

1 they contest liability here because they argue that those  
2 two individual general partners ceased being general  
3 partners at some point prior to the two-year period. This  
4 argument fails for multiple reasons. But first and most  
5 fundamentally, Your Honor, there are multiple discovery  
6 improprieties here that preclude Defendants from asserting  
7 this argument or offering evidence in support of it.

8 Defendants did not respond to any of the Trustee's  
9 discovery requests. They didn't respond to the document  
10 demands, they didn't respond to the interrogatories, they  
11 didn't respond to the request for admission. Their failure  
12 to respond to the RFAs is alone dispositive here because the  
13 Trustee requested the partnership to admit that Seymour and  
14 Marjorie were its general partners during the two-year  
15 period and those requests were deemed admitted to the  
16 Defendant's failure to serve any written responses.

17 Now, Defendants devote virtually their entire  
18 brief in opposition disputing that these admissions are  
19 deemed admitted and try to frame the Trustee's motion as  
20 somehow hinging on these admissions alone. But the reality  
21 is that Defendants would fare no better without these  
22 admissions. And that's because the BLMIS books and records,  
23 which the Trustee attached to his motion papers, established  
24 that Seymour and Marjorie were general partners of Fairfield  
25 Pagma. And if Defendants assert as a defense to summary



1 judgment that Marjorie and Seymour ceased being general  
2 partners at some point during the life of the account, it is  
3 Defendant's burden on summary judgment to point to record  
4 evidence, admissible evidence that demonstrates there is no  
5 genuine factual dispute for trial on this point.

6 But here Defendants rely on a series of documents  
7 of witnesses that they never disclosed in their initial  
8 disclosures and they never produced in response to a  
9 standing document demand under Rule 34. So Defendants are  
10 precluded from using these documents to oppose the Trustee's  
11 motion under Rule 37(c) which provides if a party fails to  
12 provide information or identify a witness as required by  
13 Rule 26(a) or (e), the party is not allowed to use that  
14 information or witness to supply evidence on a motion at a  
15 hearing or at a trial unless that failure was substantially  
16 justified or harmless.

17 Defendants, Your Honor, have not even attempted to  
18 make any showing that their failure to disclose and produce  
19 this evidence was substantially justified or harmless. In  
20 fact, the record is clear that Defendants applied a  
21 deliberate strategy of ignoring their obligations on this  
22 case, including responding to the Trustee's discovery  
23 requests. When the Trustee reached out to opposing counsel  
24 on the discovery that I just described, opposing counsel  
25 admitted that his client screamed at him to stop doing work

1 on this case when he discussed the discovery with her. That  
2 is, quite frankly, Your Honor, sanctionable conduct. And  
3 while we don't seek sanctions here, Defendants at the very  
4 least should be precluded from using this newly-disclosed  
5 evidence for the first time on summary judgment. This is a  
6 mandatory consequence under Rule 37.

7 So just to be precise, Your Honor, on what exactly  
8 should be precluded here, Defendants cannot rely on the  
9 declarations of Adam Kansler and Ronnie Leo, who they did  
10 not disclose, or the various exhibits that they didn't  
11 disclose or produce in response to the Trustee's discovery  
12 requests. That includes the articles of organization for  
13 Seyfair and Fairfox, the LLC agreements for Seyfair and  
14 Fairfox, and the Schedule K-1s for Seyfair, Fairfox, Seymour  
15 Kleinman, and Marjorie Kleinman.

16 All of that said, Your Honor, even if the Court  
17 were to for whatever reason ignore these discovery failures  
18 and consider this undisclosed and unproduced evidence on  
19 this motion, the documents simply do not show what  
20 Defendants say they show.

21 First, the articles of organization for Seyfair  
22 and Fairfox are --

23 THE COURT: Let me just interrupt you, because I  
24 have one question while you're talking about the disclosure.

25 MR. SHIFRIN: Sure, Your Honor.

1 THE COURT: Were the documents attached to Bonnie  
2 Kansler's declaration ever provided to you?

3 MR. SHIFRIN: No.

4 THE COURT: Okay.

5 MR. SHIFRIN: Well, whatever was discussed and  
6 communicated, I'll be careful here, in the context of  
7 mandatory mediation after discovery was closed, a separate  
8 issue. But in discovery five years ago, none of this stuff  
9 was disclosed, none of this stuff was produced,  
10 notwithstanding standing discovery requests requesting these  
11 materials.

12 The only thing that was disclosed in the  
13 Defendant's written initial disclosures were Fairfield  
14 Pagma's tax returns. So if the Defendants want to rely on  
15 that, I don't think they are precluded from relying on it by  
16 virtue of them not failing to disclose it, but by the fact  
17 that they failed to produce it once we requested it under  
18 Rule 34 document demand. There are consequences for that,  
19 too.

20 But in any event, Your Honor, what I was about to  
21 say was that these documents don't show what Defendants say  
22 they show. The articles of organization for Seyfair and  
23 Fairfox are irrelevant to the issue of whether Seymour and  
24 Marjorie were general partners of Fairfield Pagma and  
25 nothing in those documents shows that they ceased being

1 general partners. Fairfield Pagma's tax returns similarly  
2 do not identify its general partners and are also irrelevant  
3 for the same reason. The Seyfair and Fairfax K-1s  
4 demonstrate that the LLCs were general partners of Fairfield  
5 Pagma, but they do not demonstrate that Seymour and Marjorie  
6 were not its general partners.

7 THE COURT: Okay. You have a Shifrin declaration.

8 MR. SHIFRIN: That's correct, Your Honor.

9 THE COURT: In Exhibit 2. It's an alleged list of  
10 Fairfield Pagma Limited Partners. And Seymour and  
11 Marjorie's names are crossed out, and there's a list of at  
12 least 40 other partners. How do you know that this list  
13 references the limited partners? It only titles partners'  
14 names.

15 MR. SHIFRIN: Well, our interpretation of this  
16 document is at the top -- doesn't it say that these are  
17 limited partners, Your Honor? Isn't it a list of --

18 THE COURT: I thought the title only states  
19 partners' names.

20 MR. SHIFRIN: Okay. Well, putting aside honestly,  
21 Your Honor, that document, we can debate what it says and  
22 what it doesn't say. The core document that we attached to  
23 our moving papers were the BLMIS records, the account  
24 opening documents. And those documents were clear that when  
25 the account was opened, Marjorie and Seymore were general

1 partners. So we have met our prima facie burden of showing  
2 that Seymour and Marjorie were general partners of Fairfield  
3 Pagma when the account was opened. And again, the  
4 Defendants do not even dispute this. They concede that they  
5 were the general partners. They're simply making an  
6 argument that they were somehow substituted later on in the  
7 life of the account. But that is their burden to show.  
8 We've discharged our prima facie burden by showing that the  
9 -- that Marjorie and Seymour were general partners when the  
10 account was opened and it's their burden to provide some  
11 evidence creating a genuine issue of fact as to whether they  
12 were general partners during the two-year period. And  
13 because they haven't disclosed any of the -- I should say  
14 the vast majority of the documents that they're attempting  
15 to rely on and the witnesses that they are attempting to  
16 rely on, this evidence is precluded. And thus, they can't  
17 carry that burden and judgement should be entered in favor  
18 of the Trustee against both of the individual general  
19 partners.

20 The other document, Your Honor, I should say that  
21 they rely on are unsigned and undated LLC agreements for  
22 Seyfair and Fairfax, excuse me, which by virtue of them  
23 being unsigned is itself a basis to refuse their  
24 consideration on this motion pursuant to the caselaw that we  
25 cite in our brief. And those documents, similarly, merely

1 reference some other transaction that took place in the  
2 whereas clauses. But the LLC agreements themselves do not  
3 demonstrate that this transaction took place or otherwise  
4 provide insight into the partnership structure itself.

5 So Defendants, Your Honor, failed to attach the  
6 one document that would conclusively establish the general  
7 partners of Fairfield Pagma, and that's the partnership  
8 agreement. They also failed to attach a written notice of  
9 withdrawal for Seymour and Marjorie which would be necessary  
10 to effectuate a partnership withdrawal pursuant to New York  
11 Partnership Law, Section 121-602, which says that a general  
12 partner may withdraw from a limited partnership at any time  
13 by giving written notice to the other partners. No such  
14 written notice has been produced. We haven't seen it, and  
15 therefore there is no evidence at this point before this  
16 Court, even if a Court were to consider the evidence that  
17 should be precluded, there is no evidence here creating a  
18 genuine issue of fact for trial on this issue.

19 I will conclude very briefly, Your Honor, by  
20 discussing prejudgment interests.

21 As this Court has concluded in the Epstein summary  
22 judgment decision, absent the sound discretion to deny  
23 prejudgment interests, such interest should be awarded.  
24 Defendants have done nothing to distinguish themselves from  
25 the defendants in other good faith cases who were ordered to

1 pay prejudgment interest. And in fact, their discovery  
2 improprieties as well as their attempt on this motion I  
3 think to ignore the preclusive consequences of those  
4 improprieties further support prejudgment interest at a rate  
5 consistent with the law of this liquidation. Thank you,  
6 Your Honor.

7 THE COURT: Very good. Let me ask you a couple of  
8 questions. I'm sorry, I've lost your name for a second.  
9 Let me get it back.

10 MR. SHIFRIN: Max Shifrin, Your Honor.

11 THE COURT: Yes. Mr. Lax, you've already conceded  
12 about the LLCs. I have a question about why wasn't Adam  
13 Kansler disclosed to the Trustee and why didn't you provide  
14 his name in the documents that you attached to the  
15 declaration to the Trustee sooner? I mean, we have the  
16 Rules of Civil Procedure. Why were they not followed?

17 MR. LAX: Your Honor, if you look -- and let's go  
18 back a little bit who we represented. We represented  
19 Fairfield Pagma that at the time in 2010, they became a  
20 defunct entity. We represented the general partners, who  
21 were Seyfair and Fairfax. And then, Your Honor, in 2015 and  
22 2014, both the managing members of the general partners  
23 died. It was a very unusual fact set and fact  
24 circumstances. But who we did disclose in the 26(a)  
25 disclosure was Bonnie Kansler, Your Honor.

1           So in the reply, there is no response to Ms.  
2           Kansler's affidavit. She put in affidavit in, she put in  
3           the tax returns of 2007 and 2008. And remember, Your Honor,  
4           it is the Trustee's burden to prove that there are no  
5           material facts in dispute.

6           There is one fact here, Your Honor. And it is in  
7           dispute as much as a dispute can be. They've established no  
8           evidence, Your Honor, no evidence whatsoever that Marjorie  
9           and Seymour were the general partners in 2007 and 2008.  
10          That's when the distributions occurred, the transfers.

11          So a document that proves that Marjorie and  
12          Seymour were the general partners in 1993 does not mean that  
13          it proves that they were partners in 2007 and in 2008.

14          And, Your Honor, you asked Plaintiff's counsel a  
15          very good question; do they have these documents. And you  
16          heard Mr. Shifrin's response. It was, well, let me be  
17          clear. We might have them, but we got them in the purposes  
18          of the mediation. That's irrelevant, Your Honor. They have  
19          the documents in their possession. And Mr. Shifrin just  
20          spent time talking about the partnership agreement. He's  
21          got that document, too. But that partnership agreement  
22          establishes that both Seyfair and Fairfax were the general  
23          partners. That's why they didn't put it in their reply.  
24          They had possession of all of these documents, Your Honor.  
25          They had possession of Ronnie Leo's affidavit back in 2016



1 which disclosed most of these facts, disclosed the operating  
2 agreement --

3 THE COURT: Stop for a minute. Under the Rules of  
4 Civil Procedure, both Kansler and Leo should have been  
5 disclosed almost immediately after the adversary proceeding  
6 was filed. Is that not so?

7 MR. LAX: Ms. Kansler was disclosed.

8 THE COURT: I heard you twice. I heard you three  
9 times. I'm talking about Adam Kansler and Ronnie Leo.

10 MR. LAX: Ronnie Leo was disclosed in the  
11 Trustee's 26(a) disclosure.

12 THE COURT: When was that?

13 MR. LAX: The Trustee's 26(a) disclosure was in  
14 December of 2015. So obviously at that point in time, they  
15 knew that Ronnie Leo had facts that were relevant to either  
16 the defenses or claims asserted. They didn't tell you that  
17 either, Your Honor. They talked about --

18 THE COURT: Well, this is a 2010 case. So it  
19 should have been disclosed at least by 2011. And you're  
20 saying it was disclosed in 2015.

21 MR. LAX: Yes, Your Honor. That's when both  
22 parties exchanged their initial disclosures because there  
23 was a motion to dismiss that was pending that took a  
24 significant time period. So the answers for the case were  
25 not filed until 2015. So obviously there's no delinquency

1 on the Defendant's part by filing answers after the motions  
2 to dismiss were -- part was denied, part was granted. So  
3 that's when the initial disclosures occurred, and that's  
4 when the Plaintiff disclosed Ronnie Leo, we disclosed Bonnie  
5 Kansler at that time. But even at the time that the answer  
6 was filed, Your Honor, Seymour and Marjorie both denied that  
7 they were general partners in the answer to the complaint.  
8 So that is their position.

9 And then, Your Honor, both of them -- around that  
10 time, Ms. Kleinman had already passed away and Mr. Kleinman  
11 had just I think -- was very sick, passed away I think in  
12 January of 2016. Actually, January of 2015.

13 THE COURT: I'm a bit confused. I'm a big  
14 confused.

15 MR. LAX: Yeah.

16 THE COURT: And I'm going to turn back to  
17 Trustee's attorney for just a moment.

18 MR. LAX: And I'm sorry, Your Honor, just  
19 correcting a fact. Seymour died in September of 2015. I  
20 apologize.

21 THE COURT: Were different documents disclosed --  
22 and we're only talking about documents, not what was  
23 disclosed -- in discovery and in the mediation?

24 MR. SHIFRIN: You're asking me, Your Honor,  
25 correct?

1 THE COURT: Yes, I am.

2 MR. SHIFRIN: Your Honor, there were zero  
3 documents produced in litigation. We mediated this case  
4 just this past year, three or four years after discovery  
5 closed.

6 THE COURT: Okay, wait a minute. So during the  
7 mediation, some of these documents were disclosed at that  
8 time. I'm not asking the ins and outs, because that's  
9 mediation. But there were disclosures during the mediation.

10 MR. SHIFRIN: Your Honor, there were some  
11 documents. And he said a partnership agreement. That was  
12 never disclosed. That was never attached to their  
13 opposition. There were some documents provided to us of the  
14 first time in connection with the mediation, in connection  
15 with this argument that they were making for the first time.  
16 And after fact discovery had been closed for years and  
17 expert discovery had been closed for years.

18 THE COURT: Okay. I'm not asking you deadlines.  
19 I'm just asking you --

20 MR. SHIFRIN: Understood, Your Honor. Understood.

21 THE COURT: Okay. All right. Now then, Mr. Lax.

22 MR. LAX: Yes.

23 THE COURT: Continue with your rebuttal.

24 MR. LAX: Thank you, Your Honor. So what Mr.  
25 Shifrin said maybe wasn't at Baker Hostetler in 2015 and

1 2016. But the reason why discovery did not continue as Your  
2 Honor knows from the papers and from my partner's  
3 affirmation -- declaration. They state that discovery  
4 requests were served, notices of admission were served.

5 And by the way, Your Honor, no document requests  
6 were served on the Defendant, Seymour Kleinman. Nothing.  
7 No discovery vehicle whatsoever. But that's besides the  
8 point and I'll get back to that in a second.

9 But at that point in time, Mr. Cremona actually,  
10 Trustee's lawyer, put a time out. Said we're going to try  
11 to settle the case. And they're going to try to settle the  
12 case with Mr. Kleinman's estate lawyer, because Seymour  
13 Kleinman had passed away. So they spent it looks like a  
14 year-and-a-half trying to settle that case. Through that  
15 process, again, the Trustee received Ms. Leo's affidavit, an  
16 affidavit from Ms. Leo attaching the 2005 tax returns,  
17 attaching all of the documentation that was put in her  
18 affidavit. It's consistent with her affidavit. So the  
19 Trustee had all of those documents from the estate's  
20 counsel. They were trying to negotiate a deal.

21 It wasn't until they came back to us years later  
22 and said let's go mediate the case. So years later. They  
23 never served a motion to compel, they never did anything.  
24 Because, Your Honor, they did not serve document requests on  
25 Mr. Kleinman. So we're not delinquent at all related to Mr.

1 Kleinman. And why can't these affidavits be used to respond  
2 to Mr. Kleinman's liability on this summary judgment motion?

3 But at the end of the day, Your Honor, all they're  
4 trying to do is preclude the facts, which clearly establish  
5 that Seymour and Marjorie were not the general partners at  
6 the time. They were not. There's just no ands, ifs, and  
7 buts about it. They can't get out of Bonnie Kansler's  
8 affidavit, they can't get out of the fact that they didn't  
9 serve discovery requests on Seymour. They can't get out of  
10 the fact that the tax returns establish a fact in dispute.  
11 They establish that Seymour and Marjorie were not the  
12 general partners at the time of the distribution.

13 And Your Honor may be like, why are we doing this?  
14 Why are we doing this? Why isn't the Trustee happy with his  
15 judgement against the three entities? The reason, Your  
16 Honor, is because the limited partners that actually  
17 received the distributions are not defendants in the case.  
18 They're not family members. But what the Trustee is trying  
19 to do is the Trustee is trying to extend this judgment to  
20 the individuals so they can go back to the beneficiaries of  
21 these estates six years later and try to claw back some of  
22 that inheritance. That's what this is about. The Trustee  
23 should take his judgement on liability against the three  
24 entities, be entitled to chase those judgments down to the  
25 people that actually received the fraudulent transfers in

1 2007 and 2008.

2 Everything I just told you, Your Honor, is  
3 undisputed. None of the Defendants, none of the family  
4 members received distributions in 2007 and 2008. They're  
5 simply trying to get the individuals liable as general  
6 partners so that they can claw back from the estates that  
7 were settled years ago. That is the reason why they're  
8 doing this.

9 And I envision, Your Honor, that if the motion is  
10 denied, this case will probably be gone. Because they've  
11 got their judgement and they can go do what they need to do.

12 But, Your Honor, everything they are talking about  
13 we can cure if the Court wants to get to the ultimate issue  
14 of fact. What the Trustee wants you to do is not look at  
15 anything. That's not the way courts work. And I understand  
16 there are discovery mechanisms. But they never made a  
17 motion to compel, Your Honor. And we got an email that says  
18 we'll give you a 15-day notice. They never did that. If  
19 they would have moved to compel, if they would have brought  
20 all this stuff up at some point earlier, we might have been  
21 able to deal with it.

22 And you know what, Your Honor? We still could.  
23 We could open up discovery for the limited purpose of this  
24 general partner issue. And I'm sure the Plaintiff doesn't  
25 want to do that because they'll discover the facts that

1 we've already put in the record, that during 2007 and 2008,  
2 that the individual defendants, Seymour and Marjorie were  
3 not the general partners. I mean, to say that the operating  
4 agreement and to say that the documents attached to Ronnie  
5 Leo -- we can just focus on the Ronnie Leo declaration  
6 because they knew Ronnie Leo had information relevant to the  
7 case. That establishes in 2005 the tax returns. And she  
8 testifies firsthand, she was the accountant that did the tax  
9 returns, establishes that the interests -- that the general  
10 partnership interests were exchanged. Got a K-1. They  
11 withdrew all their interests from Fairfield Pagma, both  
12 Seymour and Marjorie in 2005. And then Seyfair and Fairfax  
13 get interest, the same exact amount of interest in the  
14 Fairfield Pagma entity.

15 So the 2005 tax returns, which are part of our 26-  
16 day disclosures, established that Seymour and Marjorie were  
17 not the general partners and Seyfair and Fairfax were.

18 THE COURT: Okay.

19 MR. LAX: Do you have any other questions, Your  
20 Honor? Otherwise, we'll rely on the papers. But in  
21 response to the reply, I think it's very clear that all the  
22 Trustee is trying to do is exclude our evidence. They don't  
23 have the basis to exclude our evidence. And if they want,  
24 we can open up discovery for the very limited purpose of  
25 determining factually who is the -- who were the general

1 partners during the relevant time period.

2 THE COURT: Any quick rebuttal? Any quick  
3 rebuttal?

4 Listen, we follow the Rules of Civil Procedure.  
5 Quick rebuttal.

6 MR. LAX: Right. I understand, Your Honor. And I  
7 appreciate that.

8 THE COURT: Okay.

9 MR. LAX: But the problem is that a notice to  
10 admit -- their biggest argument is that somehow because  
11 Fairfield Pagma --

12 THE COURT: I've heard you.

13 MR. LAX: What?

14 THE COURT: I've heard you.

15 MR. LAX: I didn't talk about this one point.

16 THE COURT: Okay, let's hear it then.

17 MR. LAX: Thank you, Your Honor. In response to  
18 Fairfield Pagma's notices to admit, the general partners --  
19 excuse me, Seymour and Marjorie already denied in their  
20 answer -- so if you look at our case that we provided to  
21 Your Honor, it's very clear that you can't use notices of  
22 admit to essentially get an admission of the ultimate fact  
23 in dispute. It's to limit what's going to happen at trial.  
24 That's the reason for notices to admit.

25 And in the case that we provided, it's very clear



1 that the Plaintiff was served -- the Plaintiff in that case  
2 served notices to admit. The Defendants had denied  
3 liability, and then the Defendants were a little late and  
4 the Plaintiffs tried to show that because they were late,  
5 they admitted to the ultimate liability in the case. And  
6 the Court said that's not fair, that's not right, you  
7 shouldn't do it that way. Because they've already denied it  
8 in the answer.

9 And also, the notice to admit, Your Honor, were  
10 only to Fairfield Pagma. They were not to any other of the  
11 defendants.

12 THE COURT: Okay, very good.

13 MR. LAX: That's all, Your Honor. Thank you very  
14 much.

15 THE COURT: Yes, sir.

16 MR. SHIFRIN: Opposing counsel just said they were  
17 a little late in that case. It is now five years since we  
18 served those RFAS. They still haven't been responded to.  
19 So I think we're outside the a little late standard to the  
20 extent that is a standard governing the Rules of Civil  
21 Procedure.

22 Your Honor, there's so much wrong with what I just  
23 heard. It was a lot of smoke and mirrors. I think our  
24 position in our reply brief adequately addresses the  
25 arguments you just heard. But there's nothing that you just

1 heard about documents being disclosed in the written  
2 disclosures. The documents that are attached to all those  
3 affidavits, even if you assume that Mr. Lax is correct about  
4 Ronnie Leo -- and I don't know anything about this. But  
5 even if in some way, shape, or form Ronnie Leo was somehow  
6 disclosed to us in 2015 or 2016 through unofficial channels,  
7 the documents attached to those affidavits have never been  
8 disclosed, so they are precluded. And if the documents are  
9 precluded, what's left is a self-serving affidavit that  
10 doesn't rely on any evidence and that doesn't get them  
11 anywhere. The other thing that Mr. Lax said in the  
12 beginning of his presentation is that it is somehow our  
13 burden to show -- to anticipate their defense. We -- our  
14 burden is to show a prima facie case or prima facie  
15 entitlement to judgment against the two general partners.

16 We showed that by showing that the defendants when  
17 they opened BLMIS accounts, the -- were general partners of  
18 Fairfield Pagma. If they're going to argue that they are  
19 not, they were not general partners during the two-year  
20 period, it's their burden, not the Trustee's burden, on  
21 summary judgment to rebut the Trustee's prima facie case and  
22 demonstrate to the Court that there's a genuine issue for  
23 trial. They have not shown that. The reason they have not  
24 shown that is for two reasons. One, they're relying on  
25 documents they didn't disclose and they didn't produce in

1 response to standing document demands, and two, even if  
2 those documents got in, the documents themselves do not say  
3 what they say for the reasons I already said.

4 Mr. Lax is trying to puff up these documents and  
5 make them sound like they're dispositive and clearly say  
6 that these two individuals were general partners. Nowhere  
7 in those documents does it say that. Nowhere.

8 THE COURT: Okay.

9 MR. LAX: And Your Honor --

10 MR. SHIFRIN: And the last thing (indiscernible)  
11 Your Honor -- excuse me, there's one other point, Your  
12 Honor. He -- Mr. Lax seems to be hiding behind this  
13 position that he does not represent the initial transferee,  
14 Fairfield Pagma, that it's defunct and he's only here  
15 appearing on this motion on behalf of the general partners.  
16 Your Honor, this is a bogus position. They're counsel of  
17 record. They've filed opposition papers to the Trustee's  
18 motion on behalf of all defendants. In 2015, they answered  
19 the complaint on behalf of all defendants.

20 They served initial disclosures on behalf of all  
21 defendants and then they say, oh, we served a document  
22 demand on Fairfield Pagma and they don't have to answer it  
23 because it's defunct, and now they appear on summary  
24 judgment only on behalf of two general partners? Give me a  
25 break, Your Honor. As you said, there are Federal Rules of

1 Civil Procedure here that govern these issues. Defense  
2 counsel is absolutely disregarding them from top to bottom.  
3 Thank you.

4 MR. LAX: Your Honor, if I just may briefly  
5 respond to one issue that was just raised.

6 THE COURT: Very briefly.

7 MR. LAX: I will be very brief, Your Honor.  
8 Bonnie Kansler's declaration. She was a disclosed  
9 individual. It was the Trustee that decided not to depose  
10 her and a self-serving affidavit, I don't even understand  
11 that that means.

12 THE COURT: That's enough. He said the word.  
13 That's enough. You said you didn't know what it means. Say  
14 something important to me.

15 MR. LAX: Okay, what is important, Your Honor, is  
16 that Bonnie Kansler and the tax returns that she -- that her  
17 declaration and the attachment to her declaration, if you  
18 just focus on that, she was disclosed in our 26(a); that  
19 defeats their summary judgment motion --

20 THE COURT: Okay.

21 MR. LAX: -- by and of itself.

22 THE COURT: All right. Very good. Thank you.

23 MR. LAX: Thank you, Your Honor. Thank you, Your  
24 Honor.

25 THE COURT: We'll take about a three-minute break.

1 MR. LAX: Are we excused? You're going to the  
2 next case, right, Your Honor?

3 THE COURT: I am. You're excused, Mr. Lax.

4 MR. LAX: Thank you very much, Your Honor.

5 THE COURT: Thank you.

6 (Recess)

7 THE COURT: We're back on the record. Good  
8 morning again. We're at 10-04468, Irving Picard Trustee,  
9 the Bernie Madoff Investment Securities and it's the Trustee  
10 v. Ken-Wen Family Limited Partnership. State your name and  
11 affiliation.

12 MR. NEIBURG: Morning, Your Honor. Michael  
13 Neiburg from Young Conaway Stargatt and Taylor on behalf of  
14 the Trustee.

15 MR. LAMBE: Good morning, Your Honor. Christopher  
16 Lambe, Young Conaway Stargatt and Taylor on behalf of the  
17 Trustee.

18 MR. ROHER: Good morning, judge. Mark Roher, R-O-  
19 H-E-R, on behalf of defendant Kenneth William Brown and Mr.  
20 Brown is also listening in, Your Honor.

21 THE COURT: Excellent. Thank you very much.

22 MR. BROWN: Morning, Your Honor. This is Ken  
23 Brown.

24 THE COURT: Very good. This is the Trustee's  
25 motion represented today unusually by Young Conaway in front

1 of me, so I believe Mr. --

2 MR. ROHER: Your Honor --

3 THE COURT: Yes, sir, wait a minute. I may have  
4 this --

5 MR. ROHER: I'm sorry.

6 THE COURT: -- confused. Mr. Roher is  
7 representing the defendant, correct?

8 MR. ROHER: Yes, Your Honor.

9 MR. LAMBE: Correct, Your Honor.

10 THE COURT: And there's a cross motion by the  
11 Trustee.

12 MR. ROHER: Correct.

13 MR. NEIBURG: Your Honor, this is Michael Neiburg.  
14 Just to set the table, I --

15 THE COURT: Please. Yeah.

16 MR. NEIBURG: Yeah, sure. So there's the motion  
17 for summary judgment filed by defendant Kenneth Brown --

18 THE COURT: Right.

19 MR. NEIBURG: And then the Trustee filed a cross  
20 motion for summary judgment as to Mr. Brown and also a  
21 motion for summary judgment as to the other defendant, Ken-  
22 Wen Family Limited Partnership.

23 THE COURT: Very good and that's -- let me read  
24 that entire title and that's what I did not do. It's the  
25 Ken-Wen Family Limited Partnership, Kenneth Brown in his

1 capacity as the general partner of Ken-Wen Family Limited  
2 Partnership, and Wendy Brown --

3 MR. ROHER: Yes, Judge.

4 THE COURT: Very good. And Mr. Roher, you're  
5 representing all in that capacity?

6 MR. ROHER: No, Judge. I'm only representing  
7 Kenneth Brown.

8 THE COURT: And who represents the Ken-Wen Family  
9 Limited Partnership?

10 MR. ROHER: Go ahead, Mr. --

11 MR. NEIBURG: I was just going to say, Your Honor,  
12 it's the Bernfeld firm. They have at one time represented  
13 all defendants. At some point several years ago, Mr. Roher  
14 stepped in to defend and represent Mr. Brown. Ken-Wen did  
15 not respond to the summary judgment as to Ken-Wen. Notice  
16 was given and Mr. Bernfeld knew of the filings and Ken-Wen  
17 did not file a response.

18 THE COURT: Very good, and defendant Wendy was  
19 dismissed from this with prejudice on -- early last year.

20 MR. NEIBURG: Correct, Your Honor.

21 THE COURT: January the 19th. Okay. So there is  
22 a default to the Ken-Wen Family Limited Partnership?

23 MR. NEIBURG: Well, they did not file a response  
24 to the summary judgment motion. As of right now, no  
25 judgment has been entered, default or otherwise.

1 THE COURT: Okay. All right. Then Mr. Lambe,  
2 you're going to be making the argument?

3 MR. LAMBE: Yes, Your Honor.

4 THE COURT: Okay. Let me hear from you, then.

5 MR. LAMBE: Great.

6 MR. ROHER: Your Honor, respectfully, I filed my  
7 motion first and there's --

8 THE COURT: Oh, you did? Then thank you. I'm  
9 getting a little confused.

10 MR. ROHER: It is a little confusing, Judge, and -  
11 -

12 THE COURT: So you filed the motion for --

13 MR. ROHER: Summary judgment.

14 THE COURT: Okay, you filed the first motion for  
15 summary judgment. Thank you, Mr. Roher, for straightening  
16 me out. And so I -- if you will please go first, then.

17 MR. ROHER: Okay, thank you, Judge. And I do want  
18 to just, for the record, thank Mr. Lambe for all this  
19 professionalism that he's shown when dealing with me. I'm  
20 not a regular practitioner before this Court. I'm admitted  
21 pro hac vice and as I said, Mr. Lambe has been very  
22 accommodating to help me through some of the procedure, so I  
23 do want to just note that.

24 But Your Honor, there's been a lot of filings and  
25 I want to -- I think actually, really, I think I had an



1 epiphany preparing for this hearing. Can I share just the  
2 relevant Florida statute or do you have that in front of  
3 you? It's Florida Statute 620.1607. If you let me share my  
4 screen, I can pull it up. It's up to you.

5 THE COURT: Give me just a moment on that. That's  
6 the Florida Partnership Law that you're talking about?

7 MR. ROHER: Yes, Your Honor, and both parties are  
8 essentially relying on two different subsections of that  
9 statute.

10 THE COURT: Okay. We are now communicating with  
11 the people in control of the screen and we're going to let  
12 you share the screen.

13 MR. ROHER: Okay, thank you. Just got to find it.

14 THE COURT: Give us a moment to make that happen.

15 MR. ROHER: Okay.

16 THE COURT: There you have it, right there. Can  
17 everyone see that, now?

18 MR. ROHER: Everyone except me. Hold on.

19 THE COURT: It is clear for me.

20 MR. ROHER: Okay, I'm just --

21 THE COURT: I'm looking at --

22 MR. ROHER: -- have to expand my --

23 THE COURT: -- Florida Statute -- I'm looking at  
24 Florida Statute 620.1607 and it's current through 2021,  
25 regular and first and second extraordinary sessions. Is

1 that correct?

2 MR. ROHER: Yes, that's correct.

3 THE COURT: Okay.

4 MR. ROHER: Okay. I can't see it, but that's  
5 okay. Okay, Judge, so --

6 THE COURT: Excuse me. Can everyone else see it?

7 MR. LAMBE: Yes, Your Honor. I can see it.

8 THE COURT: Okay. Probably because you put it up,  
9 you can't see it. I don't know.

10 MR. ROHER: Yeah, okay, maybe that's why, but --  
11 oh I see it --

12 MAN 1: I can see it, Your Honor.

13 THE COURT: Very good.

14 MR. ROHER: Okay. Judge, I think really this is a  
15 simple proposition and a simple argument, I hope, at least  
16 from my perspective. The -- if you've read the -- I'm sure  
17 you've read the papers, so as I said, 620.1607 is the  
18 operative statute. Ken-Wen Family Limited Partnership was a  
19 Florida limited partnership. There's no dispute as to that.  
20 My motion for summary judgment attaches Exhibit C and D.  
21 well, it's really D where my client withdrew as a general  
22 partner as of February 29th, 2008. I think that's largely  
23 undisputed, but I'm not going to speak for Mr. Lambe, but  
24 the evidence that I put forth in my summary judgment motion  
25 shows that Mr. Brown withdrew as a general partner as of

1 that date.

2 THE COURT: State that date again for me.

3 MR. ROHER: February 29th, 2008.

4 THE COURT: Okay.

5 MR. ROHER: And which I believe is the -- which  
6 was after -- no, sorry. I'm sorry. The transfers at issue  
7 here, Judge, occurred I believe before the -- or at least  
8 three of them, I believe, occurred before the withdrawal and  
9 one occurred after withdrawal, but I don't think -- the  
10 before and after, I don't think is really relevant. The  
11 issue, Judge, is if you look at -- I'm relying on 620,  
12 Subsection 1, Judge.

13 And it deals with the specific language being an  
14 obligation and the Trustee is taking the position that upon  
15 receipt of the transfers, the limited partnership, that  
16 incurred an obligation on behalf of the limited partnership.  
17 And my contention is that's not accurate, Judge. The  
18 receipt of a transfer -- at the time that the limited  
19 partnership received the transfer, that's not an obligation.  
20 That's not a liability.

21 That's a receipt of a transfer and those transfers  
22 are just transfers, and frankly they're still -- it's still  
23 not an obligation of the limited partnership because, as you  
24 heard before, there's no judgment yet entered against the  
25 limited partnership. So the Trustee's position is that upon

1 the receipt of a fraudulent transfer, that creates an  
2 obligation on behalf of the transferee under the Florida  
3 partnership -- limited partnership law, and that's not the  
4 case, Judge.

5 So if you look at the language of Subsection 1, it  
6 says, "A person's dissociation as a general partner does not  
7 itself discharge the person's liability as a general partner  
8 for an obligation of the limited partnership incurred before  
9 dissociation." So in this case, there's really no  
10 obligation, Judge, and my client's dissociated. And if you  
11 -- and then you look at the -- it says, the exceptions are  
12 Subsections 2 and 3. Subsection 2, I don't -- is not  
13 applicable and neither party is relying on Subsection 2.

14 But it's saying that if those exceptions aren't  
15 met, the -- I'm reading the last part of Subsection 1 -- the  
16 person is not liable for a limited partnership's obligation  
17 incurred after dissociation, so my contention, Judge, is  
18 there's still no obligation. It's twofold.

19 Either there's no obligation yet of the general  
20 partnership because there's no judgment against the limited  
21 partnership so -- and my client has dissociated and frankly,  
22 the general partnership has dissolved just -- I think in  
23 2012 and that's one of my exhibits, Judge -- or if the  
24 obligation incurred upon the receipt of the filing of the  
25 lawsuit by the Trustee, if that created an obligation, that

1 was after dissociation as well, because the lawsuit was  
2 filed after my client dissociated.

3 And I've looked -- unfortunately, there's not a  
4 lot of caselaw on this, Judge, but I'm just reading the  
5 statute. And what I did --

6 THE COURT: You're reading -- excuse me. You're  
7 reading the Florida statute.

8 MR. ROHER: Yes, Judge. The -- what I put up.  
9 I'm talking about --

10 THE COURT: I understand. I understand.

11 MR. ROHER: Okay.

12 THE COURT: And you're not reading three yet.

13 MR. ROHER: I'm not -- yeah, I'm not at three yet.  
14 I'm going to get there, judge.

15 THE COURT: Okay.

16 MR. ROHER: Thank you. And what I did was, I  
17 cited some caselaw from other -- well, it's actually from a  
18 New York case and if you look really in Paragraph 14 of my  
19 motion, which I was on Page 5 of my motion, Docket Entry  
20 174, it's talking about limited partner -- the liability of  
21 a limited -- of a general partner which regard to a limited  
22 partnership liability to pay rent and that was frankly the  
23 best case, the best type of cases I found on this issue,  
24 Judge, and I looked everywhere.

25 But in that case and the case of Barbro Realty

1 Company v. Newburger, 53 A.D.2d 34, (NY App. Div. 1976), in  
2 that case the Court found that an obligation to pay rent  
3 does not constitute a preexisting debt, so my argument is  
4 similar to that type of logic, Judge. The receipt of a  
5 fraudulent transfer by a general partnership, that doesn't  
6 create a debt or preexisting debt. It's -- you know, the  
7 obligation to pay rent is an obligation, but it doesn't  
8 arise until there's a default.

9 In this case, Judge, the obligation to repay a  
10 fraudulent transfer doesn't arise upon the receipt of the  
11 fraudulent transfer. It'll arise presumably or at least no  
12 earlier than there's either a lawsuit filed by a Trustee or  
13 maybe a demand letter, but in and of itself, the receipt of  
14 a fraudulent transfer, especially in a case of a Ponzi  
15 scheme where there's no evidence that the general  
16 partnership knew that it was a -- that this was a Ponzi  
17 scheme or a Ponzi scheme transfer, that doesn't create an  
18 obligation.

19 And I cite it here, I highlighted. "Thus Barbro  
20 held that because the obligation of a lease does not arise  
21 until rent becomes due, those who are partners in a  
22 partnership at the time of default of a lease agreement are  
23 personally liable." Okay. That's fine, Judge. My  
24 contention is, and I don't think it's disputed, that my  
25 client was not a general -- my client's not a general

1 partner anymore. He wasn't a general partner at the time of  
2 the lawsuit -- that this lawsuit was initiated.

3 And furthermore, in -- I cited 8182 Maryland  
4 Associates v. Sheehan, 14 S.W.3d 576, 583 to 584 (Mo. 2000),  
5 and that held that the Court determined that the obligation  
6 of a lease is incurred -- I'm sorry. Strike that, Judge.  
7 In Paragraph 15, I argued at 586 that that Supreme Court of  
8 Missouri held that the general partners were not personally  
9 liable for rent arising subsequent to the time they were  
10 partners of a partnership in possession of the leased  
11 premises when the lease breach occurred subsequent to the  
12 withdraw from the partnership and so that's the caselaw I  
13 cited, Judge, in support of my position that Subsection 1  
14 applies and, of course, now I have to deal with the language  
15 of Subsection 3 which the Trustee is relying on.

16 Okay, and if you look at Subsection 3, it reads,  
17 "A person that has dissociated as a general partner but  
18 whose dissociation did not result in a dissolution and  
19 winding up of the limited partnership activities" -- I  
20 agree, Judge that that -- Mr. Brown's dissociation did not  
21 result in the winding up -- "is liable on a transaction" --  
22 they're using -- the word is transaction, not obligation --  
23 "on a transaction entered into by the limited partnership  
24 after the dissociation."

25 So in this case, Judge, my contention is the

1 transaction is the limited partnership's receipt of the  
2 fraudulent transfers, but that was before dissociation, not  
3 after dissociation. So a plain reading of the statute,  
4 Judge, shows that this exception, Subsection 3, does not  
5 apply. So that's essentially the simple, straightforward --  
6 I hope it's straightforward -- argument as to why my client  
7 who is a dissociated general partner should not be held  
8 personally liable for the transfers made to the general  
9 partnership. If you're looking -- I'm asking you look at  
10 the language of the statute so this is all I want to --

11 THE COURT: I'm a bit confused by your argument,  
12 because we also have the SIPA law, so, you know, four  
13 transfers took place -- three transfers took place prior to  
14 his dissolution -- his leaving the partnership, correct?

15 MR. ROHER: Yes.

16 THE COURT: And the final transfer from BLMIS to  
17 Ken-Wen occurred on November the 17th, 2008 and he left the  
18 partnership --

19 MR. ROHER: February 2008.

20 THE COURT: And the other three, yes, were prior  
21 to that.

22 MR. ROHER: Correct, Judge.

23 THE COURT: Okay. I want to focus on Subsection  
24 3.

25 MR. ROHER: Okay. I'm sorry, do you want -- is



1 that a question, or do you want me to talk about it again?

2 THE COURT: Well, I'm looking at it right now --

3 MR. ROHER: I'm sorry.

4 THE COURT: -- and you were mentioning it, so  
5 again, expand on what you're thinking about three.

6 MR. ROHER: Yes, and I apologize this wasn't in my  
7 papers, Judge, but I really -- if I focus on the language of  
8 the statute, but in Subsection 3, it talks about a  
9 transaction that a general partnership would be liable on a  
10 transaction and not an obligation, but a transaction. Here,  
11 they're talking -- here, the statute references a  
12 transaction and what I believe would qualify as a  
13 transaction would be the transfers by Madoff to the limited  
14 partnership.

15 THE COURT: Okay.

16 MR. ROHER: All right? But that was -- and  
17 whether it was after dissociation.

18 THE COURT: So there were at least three that were  
19 pre-dissociation.

20 MR. ROHER: Correct, and there was one after, yes.  
21 And I don't believe A and B are applicable, 3(a) and (b).

22 THE COURT: Okay. All right.

23 MR. ROHER: So I have arguments, Judge, in  
24 opposition to the summary judgment motion. I don't know if  
25 you want to hear them now or if you just would like to deal

1 with my motion. However you feel is appropriate.

2 THE COURT: Well, I think it's appropriate that  
3 they have rebuttal to your motion and then begin theirs and  
4 then you answer theirs.

5 MR. ROHER: I agree, Judge.

6 THE COURT: Okay. Very good. Thank you. If you  
7 will take this down, please.

8 MR. ROHER: Yes, Judge. Stop share.

9 THE COURT: Perfect. Thank you very much.

10 MR. ROHER: Thank you, Judge.

11 THE COURT: Now, Mr. Lambe, first if you would  
12 rebut what we just heard and then begin your summary  
13 judgment.

14 MR. LAMBE: Yes. Thank you, Your Honor. So as  
15 Mr. Roher had just pointed out, he's relying on Section  
16 6230.1607, Sub 1 of the Florida statutes. The last sentence  
17 of that subparagraph states that certain exceptions apply.  
18 Those exceptions are listed, as we just discussed, in  
19 Paragraph 3. Now, I believe that Paragraph 3 is actually  
20 important and all parts of that subparagraph are important  
21 and it states that a person that dissociated as a general  
22 partner but his dissociation did not result in a dissolution  
23 and winding up of the limited partnership's activity is  
24 liable on a transaction entered into by the limited  
25 partnership after the dissociation if -- and all of these,

1 the following must all occur.

2 A general partner would be liable on the  
3 transaction and then at the time that the other party enters  
4 into the transaction less than two years have passed since  
5 the purported dissociation and that the other party does not  
6 have notice of the dissociation. Your Honor, I can get more  
7 into this on the Trustee's motion for summary judgment, but  
8 I'll touch on it here.

9 THE COURT: Okay.

10 MR. LAMBE: This Court has held several times that  
11 a general partner is liable for the debts of the  
12 partnership. That was held in the Merkin case under New  
13 York law and then also in Avellino under Florida law.  
14 Florida law is no different and states that a general  
15 partner of a limited liability partnership remains liable  
16 for the debts of the partnership. This Court has also held  
17 that a Trustee may recover from the general partnership as  
18 initial transferee of fraudulent transfers or from the  
19 general partner under applicable state law. I believe that  
20 we have that here in Section 1607 Sub 3.

21 3(a) is satisfied because, as I just stated, a  
22 general partner would be liable under state law and -- for  
23 the debts of the general partnership. The issue with the  
24 November 17th transfer which took place approximately -- I  
25 believe that's eight, eight-and-a-half months or so after

1 the purported dissociation on November 29th, 2008, which Mr.  
2 Roher just stated that there is no dispute that the date in  
3 which Mr. Brown had dissociated from Ken-Wen was, in fact,  
4 in February of 2008. That is less than two years, Your  
5 Honor, and I would ask Your Honor to take notice of that  
6 fact. Furthermore --

7 THE COURT: Let me just ask you something. Just -  
8 -

9 MR. LAMBE: Of course.

10 THE COURT: -- something that's sort of been  
11 troubling me since I've heard the first of the arguments.  
12 Was notice given to the records that you can find to the  
13 Bernie Madoff Investment Securities of the dissolutionment  
14 of that partnership?

15 MR. LAMBE: That's exactly what my next point was  
16 going to be, Your Honor.

17 THE COURT: Okay, good. All right. All right.

18 MR. LAMBE: -- evidence that would suggest that  
19 Mr. Brown informed BLMIS of the dissociation. And in fact,  
20 if you look at the request that Mr. Brown submitted for that  
21 November 17th, 2008 transaction, it almost mirrors the other  
22 requests. It's a handwritten note. The only distinction is  
23 that he signed as Kenneth Brown, FLP; whereas in the other  
24 requests, he signed as Kenneth Brown, FLP GP, indicating  
25 that he was in fact making those requests as a general

1 partnership -- or as a general partner.

2 THE COURT: That was really a question for the  
3 other side, and I thought about it then, but I -- okay,  
4 thank you. Go ahead.

5 MR. LAMBE: So Your Honor, just to close the loop  
6 on that, I believe that 1607 Sub 3, the exception provided  
7 in the Florida statute, is applicable here. Mr. Roher's  
8 comments regarding the first subsection kind of missed the  
9 mark here in the fact that it doesn't contemplate Subsection  
10 13. Mr. Roher also touched on the issues of when a claim  
11 arises for a fraudulent transfer. In his papers and then  
12 just recently before, he stated to Your Honor that he cited  
13 to cases from the Missouri Supreme Court.

14 It's the Trustee's position, and we submit that  
15 the Court finds the same, these cases that are cited are  
16 wholly inapplicable to fraudulent transfer cases. These  
17 cases dealt with the timing of when the obligation to pay  
18 rent on a commercial leases arises, so we would submit that  
19 those cases are inapplicable. In Goodman's -- I'm sorry, in  
20 Grossman's in the Third Circuit, which has been applied in  
21 this Court in the Southern District, a claim can arise at  
22 the time that the conduct occurs, giving rise to the injury  
23 and that a claim can also arise before the right to payment  
24 occurs.

25 Here, these fraudulent transfers were made and

1 those transfers, as the Court has held in other cases, those  
2 transfers consisted entirely of fictitious profits. They  
3 were customer property and therefore the transfer of  
4 customer property is what gives rise to the claim of the  
5 fraudulent transfer under 548(a)(1)(A). That is -- to the  
6 extent Your Honor has any questions regarding this specific  
7 statute, I'd be prepared to go into some of the other issues  
8 that the Trustee noted with Mr. Brown's motion for summary  
9 judgment and his response --

10 THE COURT: And they -- and those, that's in your  
11 papers already?

12 MR. LAMBE: Yes, it is, Your Honor.

13 THE COURT: Okay. No, you can go ahead, then.

14 MR. LAMBE: Okay. Mr. Roher actually led off this  
15 conversation that it's undisputed that Mr. Brown dissociated  
16 on February 29th, 2008. I'm not going to waste any more  
17 time on this issue and, you know, we accept that, the fact  
18 that there is no genuine dispute with regard to that date.  
19 Further, the undisputed evidence establishes that Mr. Brown  
20 was, in fact, a general partner of Ken-Wen in 2006, 2008,  
21 and 2008. He made these allegations -- he made the  
22 allegations that he dissociated from Ken-Wen in February of  
23 2008 in his motion to dismiss, his motion for summary  
24 judgments, and even in the response for -- in his response  
25 to the Trustee's cross motion for summary judgment.

1           He made the same allegations during his sworn  
2       deposition testimony and, Your Honor, the documents that Mr.  
3       Brown attaches to his filings also contradict any argument  
4       that Mr. Brown dissociated at any other point other than  
5       February 29th, 2008. One thing that I did want to touch on,  
6       Your Honor, is that in Mr. Brown's response, he seems to  
7       allege that he never was a partner of Ken-Wen. I believe  
8       that this argument is moot, as Mr. Roher had stated earlier  
9       that there's no genuine dispute that Mr. Brown was in fact a  
10      general partner of Ken-Wen.

11           We already touched on 1607(3), so I won't belabor  
12      the point on that issue, Your Honor. As I stated earlier,  
13      Mr. Brown is liable for the fraudulent transfers that were  
14      sent from BLMIS to Ken-Wen as a partnership. Ken-Wen is the  
15      initial transferee here, Your Honor, and Mr. Brown as a  
16      general partner of Ken-Wen is liable for the debts of the  
17      partnership.

18           He also makes some procedural arguments which the  
19      Trustee submits are waived, Your Honor, the first of which  
20      is regarding insufficiency of service of process. Former  
21      counsel for Mr. Brown expressly accepted service of the  
22      complaint and the summons and actually waived any and all  
23      objections to the insufficiency of service of process. Even  
24      if we didn't have that stipulation, Mr. Brown waived this  
25      objection by failing to include it in his motion to dismiss

1 which was filed at Docket No. 95.

2 Similarly, his arguments and objections regarding  
3 personal jurisdiction and venue are also waived under Rule  
4 12(h) of the Federal Rules of Civil Procedure, made  
5 applicable through -- to the bankruptcy proceedings through  
6 Rule 7012, so personal jurisdiction and venue as they were  
7 not raised in his motion to dismiss are waived.

8 Nonetheless, this Court has held repeatedly that venue is  
9 proper in the Southern District of New York and the Court  
10 has also held that it has subject matter jurisdiction over  
11 these cases under 28 U.S.C. 1334, Section 157 of the  
12 Bankruptcy Code, and the amended standing order of  
13 reference.

14 Some of the other arguments that Mr. Brown makes,  
15 I'd like to address are his -- the mere conduit defense.  
16 Your Honor, Ken-Wen had complete dominion and control over  
17 the funds that were transferred in the fraudulent transfers  
18 in this case. The guidepost in measuring dominion and  
19 control is not who actually used the funds, but who -- it's  
20 who first had the right to use the funds. Here, Ken-Wen had  
21 the right and as I stated before, the Trustee may recover  
22 from Ken-Wen as the initial transferee as it had dominion  
23 and control over the funds.

24 Mr. Brown seems to conflate the party by which the  
25 Court looks to establish fraudulent intent under



1 548(a)(1)(A). It's not Mr. Brown's intent that the Court  
2 looks to. Rather, it's the Debtors' intent, the intend of  
3 BLMIS. When I transition to discuss more fully, Your Honor,  
4 the Trustee's motion for summary judgment, I'll go through  
5 the elements which I know you are already very well versed  
6 in, so I won't belabor the point here as well.

7 Mr. Brown also suggests that he took for value.  
8 This Court has held that fictitious profits from a Ponzi  
9 scheme can never equal value as contemplated by the defenses  
10 in 548(c). Also, contrary to Mr. Brown's assertion, the  
11 Trustee was not actually required to plead an actual  
12 knowledge or willful blindness here. The Trustee is not  
13 seeking to recover the principal that Ken-Wen submitted to  
14 BLMIS. We're only seeking to recover the fictitious profits  
15 above and beyond the principal that was invested.

16 Your Honor, that concludes the arguments that I  
17 have in response and objection to Mr. Brown's motion. There  
18 are others that were scattered throughout Mr. Brown's  
19 response and to the extent Your Honor has any questions  
20 about them, I'd be happy to answer them.

21 THE COURT: Well, I just want to make sure you  
22 have addressed even the ones that he brought up in your  
23 papers.

24 MR. LAMBE: Yes, Your Honor. So there are --

25 THE COURT: Why don't you just touch on the ones

1 you think that were brought up that you probably need to  
2 address?

3 MR. LAMBE: Of course. Thank you. The first one  
4 relates to the dominion and control element. Mr. Brown  
5 suggests that the funds that were transferred into the Ken-  
6 Wen accounts at Paradise Bank and Bank of America were then  
7 transferred to an offshore account in Southpac for the sole  
8 purpose and benefit of Ms. Werner, who as Your Honor stated  
9 earlier has been dismissed from this case.

10 In fact, Your Honor, those funds were actually  
11 used to pay off a loan that Mr. Brown had taken out to pay  
12 off a \$6.2 million judgment that the SEC imposed upon Mr.  
13 Brown in his own investment advisory business, so just going  
14 back to the argument I made earlier, regardless of what  
15 happens to the funds after the transfer, Ken-Wen received  
16 the funds. They had dominion and control and the Trustee  
17 can recover from Ken-Wen as initial transferee and from --  
18 or from Mr. Brown as the general partner.

19 Mr. Brown also discusses the intent of Congress in  
20 passing SIPA in that it's used to protect customers from  
21 failed broker deals such as this; however, as this Court has  
22 already held, the real victims here are the net losers.  
23 It's the folks that did not recover the principal that they  
24 invested. Here, Ken-Wen and Mr. Brown actually recovered  
25 more than five times what their initial investment was. So

1 Your Honor, his argument regarding the intent of Congress  
2 must fail here as well.

3 Similarly, Mr. Brown appears to make a 546(e)  
4 argument; however, as this Court has held and as it plain on  
5 the face of the statute, 546(e) is not a defense to cases  
6 asserting actual fraudulent intent under 548(a)(1)(A).  
7 Those are the -- that is the balance of the arguments that  
8 the Trustee took issue with, Your Honor, unless you'd like  
9 me to continue on to the Trustee's main case and motion for  
10 summary judgment. I can do that now, or if you have other  
11 further questions --

12 THE COURT: Okay.

13 MR. LAMBE: -- I'd be happy to answer them.

14 THE COURT: There's one thing that you didn't  
15 touch on, but that you touched on your papers, that you had  
16 knowledge of the Defendant's bankruptcy in -- I believe it  
17 was in October of 2015.

18 MR. LAMBE: Yes, Your Honor.

19 THE COURT: Now I have a question for the -- for  
20 Mr. Roher on that, but do you have anything you wish to add  
21 to that?

22 MR. LAMBE: Just only with respect to the  
23 bankruptcy discharge, Your Honor. Florida state law or  
24 Florida applying Bankruptcy Code states that unless a  
25 creditor is provided with actual notice of the bar date,

1 failure to provide that notice does not discharge a  
2 creditor's claims against the party asserting bankruptcy.

3 To the extent that Mr. Brown does assert that  
4 argument here, it's not -- it's -- the argument must fail.  
5 And we see here that even -- and you know, Mr. Brown admits  
6 the fact that the Trustee was not provided notice of the bar  
7 date, I would point Your Honor to Exhibit C of the Trustee's  
8 reply, which is a complaint filed in the -- I believe the  
9 Southern District of Florida where Mr. Brown filed a -- an  
10 action against his bankruptcy for ineffective representation  
11 of counsel. Specifically in Paragraph 67, he notes that his  
12 bankruptcy counsel did not provide the Trustee with notice  
13 of the individual or the personal Brown bankruptcy leaving  
14 him open to dispute a potential \$4 million judgment.

15 THE COURT: And now -- and let me be clear on the  
16 dates these -- the transfers occurred. Do you have those in  
17 front of you?

18 MR. LAMBE: Yes, I do, Your Honor.

19 THE COURT: And the amount too, please.

20 MR. LAMBE: Yes. So, the first transfer was on  
21 June 24th of 2007 in the amount of --

22 THE COURT: 24th, not 26th.

23 MR. LAMBE: Your Honor, just let me confirm.

24 MAN 1: I believe it's the 26th. I'm looking at  
25 the exhibit, Judge. Exhibit B to the amended complaint.

1 THE COURT: I believe the next one might be  
2 January the 24th, but -- not the next one, the third one,  
3 but...

4 MR. LAMBE: Yes, Your Honor. My apologies. It's  
5 June 26th of 2007, and the amount is for \$150,000.

6 THE COURT: Okay.

7 MR. LAMBE: The second transfer took place on  
8 December 31st of 2007 in the amount of \$500,000. The next  
9 transfer was January 24th of 2008 in the amount of \$3  
10 million. And finally, the fourth transfer on November 17,  
11 2008 in the amount of \$200,000 for a total of \$3.85 million.

12 THE COURT: And then when -- what was the time of  
13 the SIPA filing?

14 MR. LAMBE: The original complaint was filed, Your  
15 Honor, on November 12th of 2010.

16 THE COURT: Okay. All right.

17 MAN 1: Your Honor, I'm sorry to interrupt. When  
18 you said the SIPA filing, do you mean like the actual filing  
19 of the cases or this adversary?

20 THE COURT: I think it's the actual -- I think I  
21 need to know the actual filing of the cases.

22 MAN 1: Yeah, it's December 11, 2008. Sorry to  
23 interrupt.

24 THE COURT: December 11th, not November 12th.  
25 Okay.

1 MAN 1: Yeah, the November 12th of 2010 was the  
2 date of this lawsuit. But if you're looking at the SIPA and  
3 the BLMIS proceedings, it was December 11, 2008.

4 THE COURT: Okay.

5 MAN 1: Sorry about that.

6 THE COURT: Well, both of those are good I think  
7 because we're talking -- I just am moving a bit to the --  
8 when the liability arose is what I was looking at. So,  
9 either one of those are almost, okay, back together.

10 MAN 2: Yeah, Your Honor. I don't think there's  
11 any dispute that the four transfers at issue occurred within  
12 the two-year period prior to the petition date.

13 THE COURT: Right. Right. Right. One occurred  
14 almost immediately before the petition date, a month.

15 MAN 2: (indiscernible)

16 THE COURT: The last one.

17 MR. LAMBE: In the amount of \$200,000, yes.

18 THE COURT: That \$200,000 one. Okay. And that's  
19 the adversary. Okay. All right. Very good. Is that all  
20 you wish to -- let me see -- let me -- I'm looking at my  
21 information. I wanted to see if I had any real questions  
22 for you in all my maneuverings here. I don't believe so.

23 MR. LAMBE: Okay, Your Honor. Would you like me  
24 to present on the Trustee's Motion for Summary Judgment, or  
25 would you --

1 THE COURT: Please. Please.

2 MR. LAMBE: Okay.

3 THE COURT: Go right ahead.

4 MR. LAMBE: Thank you.

5 MR. ROHER: Judge --

6 THE COURT: Because I'm going to -- oh, Mr. Roher,  
7 do you want to speak first?

8 MR. ROHER: I -- if I can just rebut some of the  
9 --

10 THE COURT: Okay. Well, before you do that, then,  
11 I have a question for you as you start to rebut it.

12 MR. ROHER: Okay.

13 THE COURT: Because I'm -- the bankruptcy I know  
14 is going to come up probably in the other one.

15 MR. ROHER: Okay.

16 THE COURT: But did you have any proof that the  
17 Florida bankruptcy was served on the Trustee in this case?

18 MR. ROHER: No, Judge.

19 THE COURT: Okay. Now then you can go ahead.

20 MR. ROHER: Yeah. Just for the record, and I  
21 wasn't the -- I wasn't Mr. Brown's bankruptcy counsel.

22 THE COURT: Yeah, I understand that.

23 MR. ROHER: I actually did sue his -- I did  
24 represent Mr. Brown in his lawsuit against his former  
25 bankruptcy counsel. From what I understand, the lawsuit was

1 listed in the Statement of Financial Affairs, I believe.  
2 But -- and the -- at some point, the Trustee in 2015 did  
3 have actual notice of the -- of Mr. Brown's pending  
4 bankruptcy but did not do anything. Did not file a claim or  
5 ask to file a claim. And I think that that was undisputed.  
6 And Mr. Brown's bankruptcy case was still open in 2015. And  
7 my argument is the Trustee could've done something. I argue  
8 -- I don't know if technically the Trustee was obligated to  
9 do that, but the Trustee certainly could have done that.

10 A few things, Judge. The Grossman's case that was  
11 cited by the Trustee, that doesn't respectfully stand for or  
12 support the argument that's being made to state when a  
13 fraudulent transfer claim arises. The -- obviously, there's  
14 a statute of limitations clawback, but in Grossman's, it's  
15 talking about when claims arise in terms of when a creditor  
16 has the right to file a proof of claim. It doesn't discuss  
17 anywhere that a -- when a fraudulent transfer claim arises,  
18 when a Trustee's fraudulent transfer claim arises.

19 I think by virtue of Section 548 and 546 it's, you  
20 know, the two years clawback. But so that -- I think that's  
21 an important, you know, distinction because I'm not going to  
22 regurgitate my argument. I think my -- I was hopefully  
23 clear what my position is with regards to an obligation and  
24 a transaction.

25 So, with regards to my -- to Mr. Brown's Motion



1 for Summary Judgment and my obligation to be intellectually  
2 honest with the Court, and stick with my argument, Judge, my  
3 reading of the statute, especially Subsection 3, that at  
4 most, Judge, that my client should be able to defeat the  
5 first three transfers at issue here. We just went through  
6 them. There's -- of the four transfers, Judge, there was  
7 only one transfer that occurred after dissociation, and  
8 that's for \$200,000.

9 And for the record, Judge, my -- the -- we're  
10 relying on in the -- in the Motion for Summary Judgment,  
11 we're relying upon -- we relied upon the 2008 date. You  
12 know, my client has -- subsequent to that, my client  
13 discussed with me, and he set forth in his affidavit that,  
14 you know, in 2006 he, I guess for lack of a better word,  
15 unofficially dissociated in terms of his role with the  
16 general partnership. So, I just wanted to point that out.  
17 And I think that goes more towards the opposition to the  
18 Trustee's Motion for Summary Judgment, but I'm not going to  
19 raise that now.

20 But I think that's -- again, based on my reading,  
21 and again, in terms of my Motion for Summary Judgment, I  
22 think -- again, based on the language of 620.1607, I think  
23 my -- or my client is entitled to summary judgment as to the  
24 first three transfers; \$150,000 on June 26, 2006; 500,000 on  
25 December 31, 2007; and three million on December 31, 2007.

1 So, and -- so that -- unless you have any other questions,  
2 Judge, that's all I have to say in rebuttal.

3 THE COURT: No, I do not.

4 MR. ROHER: Okay. Thank you.

5 THE COURT: Now then to your summary judgment.

6 MR. LAMBE: Thank you, Your Honor. I -- and just  
7 before I get into that, I just want to make one notation  
8 regarding 620.1607 of the Florida Statute in Subparagraph 1.  
9 It states that a dissociation does not in itself discharge  
10 the person's liability as a general partner. That occurred  
11 before the dissociation. I don't believe Mr. Roher's  
12 arguments that he's -- that his client is not liable for the  
13 three transfers before the dissociation is applicable here  
14 or implicated by this Florida statute.

15 And then just briefly with respect to the  
16 bankruptcy filing in Florida, Your Honor, the Trustee  
17 attached as Exhibit B to his reply various affidavits of  
18 service showing who the noticed parties were to the Brown  
19 bankruptcy. You'll see that the Trustee does not appear on  
20 any of those affidavits of service.

21 And then more so, the confirmation order in the  
22 Brown bankruptcy was entered on March 3rd of 2015. I  
23 believe Mr. Roher was referencing the Certificate of Default  
24 Judgment that we filed at Docket Number 62. That was filed  
25 in October of 2015. So, Your Honor, there's -- the plan had

1 already been confirmed by the time the Trustee had knowledge  
2 of this case.

3 But shifting gears to the Trustee's Motion for  
4 Summary Judgment, Your Honor, as we've heard here today, I  
5 don't think there are any genuine issues of material fact  
6 with respect to the Trustee's claim that would prevent the  
7 Court from entering summary judgment on behalf of the  
8 Trustee and against Ken Brown and Mr. Brown. Neither Ken  
9 Wen nor Mr. Brown dispute that they received the fraudulent  
10 transfers within the two-year period between December 11,  
11 2006 and December 11, 2008. They don't dispute that BLMIS  
12 had an interest in the property that was conveyed in those  
13 transfers, and they do not contest that BLMIS, in fact, was  
14 a Ponzi scheme.

15 In connection with the fact that there are no  
16 genuine issues in material fact in the Court's prior rulings  
17 in these cases, we would ask that the Court submit judgment  
18 or provide judgment in favor of the Trustee in stating that  
19 the fraudulent transfers are avoidable under 548(a)(1)(A),  
20 and that the Trustee may recover those fraudulent transfers  
21 from Ken Wen as the initial transferee or Ken Brown as the  
22 general partner of Ken Wen.

23 I'm going to move through the elements of the  
24 Trustee's claim, Your Honor. I'll try not to belabor the  
25 point -- the points that have already been decided by this

1 Court in several other proceedings. As I stated earlier,  
2 Mr. Brown admits that BLMIS was in fact a Ponzi scheme and  
3 that there is no genuine dispute regarding BLMIS' actual  
4 intent to hinder, delay, or defraud its creditors.

5 Mr. Brown admits that the Trustee's experts have  
6 confirmed that BLMIS, in fact, was a Ponzi scheme; that they  
7 did not purchase ample treasury securities; that they did  
8 not implement the split strike conversion strategy; and that  
9 they paid redemptions from co-mingled customer funds with  
10 the actual intent to defraud. Beyond that admission, Your  
11 Honor, this Court has already held that the Trustee is  
12 entitled to rely on the Ponzi scheme presumption.

13 It's the law of the case, and Mr. Brown has not  
14 presented any sufficient justification to turn away from  
15 this precedent. Even if the Trustee was not entitled to  
16 rely on the Ponzi scheme presumption, the Trustee's experts  
17 confirmed that BLMIS was, in fact, a Ponzi scheme. The  
18 BLMIS employees substantiated these findings through their  
19 criminal plea allocutions and their testimony.

20 Mr. Brown offers no evidence to rebut the  
21 Trustee's expert's findings going as far as to state that it  
22 is unnecessary to depose the Trustee's experts as their  
23 expert reports are admissible. Beyond that presumption,  
24 Your Honor, the Trustee has also established liability  
25 through a batches of fraud analysis. The evidence produced

1 by the Trustee in this case establishes that BLMIS concealed  
2 facts from its Creditors, that the fictitious profits lacked  
3 consideration, and that BLMIS was indeed insolvent.

4 BLMIS did not make any trades on behalf of its  
5 customers. It has no funds other than the customer  
6 property, which was inadequate to cover its liabilities, and  
7 the consideration consisted entirely of fictitious profits.  
8 As the Court held in -- as the Second Circuit held in  
9 Solomon, the existence of several batches of fraud can serve  
10 as an independent basis for establishing liability for the  
11 actual intent to defraud.

12 With respect to the second element, Your Honor,  
13 there's no dispute that Ken Wen received the fraudulent  
14 transfers in this two-year period. We have it here on the  
15 record today. I won't belabor the point.

16 THE COURT: Let me just interrupt you there, and  
17 then you can come back. Because you're saying to me that  
18 the transfers dates are when the obligation was under the  
19 Florida law, correct? And then the Defendant is stating  
20 it's the adversary date when the obligations arose. Am I  
21 hearing both of you correct?

22 MR. LAMBE: Your Honor, I believe that the --  
23 under the Bankruptcy Code, the right to a claim arises at  
24 the time the injury occurs.

25 THE COURT: Okay. And so --

1 MR. LAMBE: And then -- I'm sorry. Go ahead, Your  
2 Honor.

3 THE COURT: No, no, go ahead. Finish your  
4 statement.

5 MR. LAMBE: So, I apologize, Judge. I might be --

6 THE COURT: There's a Third Circuit case on this,  
7 and it's -- the Plaintiff states that the transfer dates are  
8 when the obligation arose under Florida law. The Defendant  
9 states that it's the adversary date when the obligations  
10 arose. If the Court thinks that the date of the SIPA filing  
11 was when the liability arose under Florida law, if that's  
12 incorrect, how -- and if that's how the Court rules, how  
13 would that affect your argument of the Florida law?

14 MR. LAMBE: Well, Your Honor, it's -- I believe  
15 that the liability arose at the time of the transfer. So,  
16 the three transfers that Mr. Brown requested as general  
17 partner before its dissociation date are clear that it's --  
18 you know, he'd be liable as a general partner of Ken Wen.  
19 The fourth transfer, which is after the date, he would also  
20 be held liable for under Subsection 3, Your Honor. So, I  
21 don't believe that it would affect the analysis.

22 THE COURT: Okay. All right. Well, I -- okay.

23 MR. ROHER: Would you like me to respond to that?  
24 I don't want to --

25 THE COURT: Not yet. I'll get there in just a

1 minute because I'm still struggling with what his answer  
2 was.

3 MR. ROHER: I'm -- yeah, I'm sorry, Judge. I  
4 didn't mean to interrupt.

5 THE COURT: Because this is a fraudulent claim.  
6 We're talking about a fraudulent transfer, correct, Mr.  
7 Lambe?

8 MR. LAMBE: Correct, Your Honor.

9 THE COURT: So --

10 MR. LAMBE: Under 548(a)(1)(A).

11 THE COURT: Because we talked about Grossman, and  
12 that was the Third Circuit. The claim arose with the pre-  
13 petition conduct, and that case was discussing a pre-  
14 petition tort claim brought by an individual against the  
15 Debtor and not a fraudulent transfer claim.

16 MR. LAMBE: Correct. And the Trustee acknowledges  
17 that distinction, Your Honor. We cite to Grossman's for the  
18 proposition in trying to make the connection of when the  
19 claim for a fraudulent transfer claim arises. Which is, as  
20 I stated earlier, we believe that it was -- you know, that a  
21 claim for a fraudulent transfer arises at the time of the  
22 conduct -- at the time of conduct giving rise to the injury.  
23 And the injury here was the transfer of customer funds,  
24 which in and of itself under the Ponzi scheme presumption is  
25 a fraudulent transfer under 548(a)(1)(A).

1 THE COURT: Okay. Very good. Finish up with your  
2 bullet points.

3 And I'll let you speak, Mr. Roher.

4 MR. LAMBE: Thank you, Your Honor. I'll be brief  
5 with the remainder of my comments.

6 THE COURT: Mm-hmm.

7 MR. LAMBE: So, it's not in dispute that Ken Wen  
8 received the fraudulent transfers within the two-year  
9 period. So again, I won't belabor that point, Your Honor.  
10 The final element is BLMIS' interest in the property that  
11 was conveyed. This Court has repeatedly rejected the  
12 arguments that the investment advisory business at BLMIS was  
13 not actually part of BLMIS.

14 Upon review of BLMIS' Form EDs and the Articles of  
15 Organization, this Court has held that BLMIS was the owner  
16 of the JP Morgan accounts, which did indeed hold the  
17 customer property. And because Madoff transferred ownership  
18 of all of the assets originally held by the sole  
19 proprietorship to the onus upon the formation of the LLC,  
20 that BLMIS does in fact have an interest in the property  
21 that was conveyed.

22 The last point, Your Honor, that I'd like to  
23 highlight for the Court is -- implicates Local Rule 7056.  
24 Neither Mr. Brown nor Ken Wen controverted the Trustee's  
25 Statement of Material Facts. And pursuant to Local



1 7056(f)(1)(D), the Trustee's Statement of Material Facts are  
2 deemed admitted.

3 In addition, Mr. Brown failed to include citations  
4 to admissible evidence in support of his motion for summary  
5 judgment and in his opposition to the Trustee's cross-motion  
6 for summary judgment, which is a violation of Local Rule  
7 7056-1(e). So, the Trustee respectfully requests that the  
8 Court not consider those unsupported allegations in deciding  
9 these motions.

10 With respect to the affidavit that Mr. Roher had  
11 previously mentioned, and which was filed as Exhibit A to  
12 Mr. Brown's reply, the affidavit generally is an unsupported  
13 self-serving affidavit. This Court and the Second Circuit  
14 have held that unsupported inconclusory statements in a  
15 declaration cannot overcome a properly pleaded and  
16 sufficiently supported motion for summary judgment. So,  
17 unless Your Honor has any other questions with respect to  
18 the Trustee's papers or arguments, I'd like to thank the  
19 Court for giving me the opportunity to argue here today.  
20 This was my first oral argument.

21 THE COURT: Nice having you.

22 Mr. Roher?

23 MR. ROHER: Yes. Thank you. Mr. Lambe did a good  
24 job, and it definitely was much better than my first one. I  
25 can tell you that. My --

1 THE COURT: Mine too.

2 MR. ROHER: -- first -- I remember my first court  
3 appearance was to announce an agreed settlement, and I don't  
4 think I got any coherent words out of my mouth. Unopposed  
5 agreement.

6 THE COURT: I can also tell you all if we're doing  
7 war stories, I remember my first trial. And boy was it  
8 horrible, so...

9 MR. ROHER: Well, that's why it's called  
10 practicing law, you know?

11 THE COURT: Yeah. Okay. Go ahead.

12 MR. ROHER: Yeah.

13 THE COURT: We're hearing rebuttal. Right.

14 MR. ROHER: Thank you, Judge. I'll be brief.  
15 I'll try to be brief. The important -- I think the Court's  
16 touched on the central issues here, and that's the language  
17 of Florida Statute 620.1607. And Mr. Lambe's position is  
18 that -- or the Trustee's position is that the obligation of  
19 Ken Wen arose upon the receipt of the fraudulent transfers.  
20 But I just don't see that. I don't see any support for  
21 that.

22 And again, my argument, just to reiterate, Judge,  
23 is that there's no obligation right now. There's no  
24 judgment. Or again, if there was any obligation, it would  
25 be upon the filing of the complaint, the adversary

1 complaint. Or even if you want to go a bit earlier upon the  
2 initiation of the SIPA action, I'm not sure if I'm calling  
3 it the right thing, but I think I'm -- hopefully you  
4 understand what I'm saying, Judge.

5 And the thing also, Judge, is that what we have  
6 here is the Trustee is suing Ken Wen as the initial  
7 transferee, which it sounds like they're -- you know, no  
8 one's defending it, and there's going to be a judgment  
9 entered against Ken Wen. I'm not -- I don't represent them.  
10 I'm not defending it. And frankly, you know, I don't see  
11 why -- you know, I wouldn't be surprised if the Court enters  
12 judgment against Ken Wen. I think the Trustee's met his  
13 burden to -- especially if there's no opposition, Judge.

14 But that's not the issue we're really here for  
15 today, Judge, because they're -- the Trustee is trying to  
16 impose personal liability on my client by virtue of the fact  
17 that he was a general partner. So, there's a distinction  
18 here, Judge, that respectfully I think Trustee is kind of  
19 glossing over and hoping the Court kind of glosses over that  
20 fact. That's a different case here, Judge.

21 If we're here on, you know, the action only  
22 against the general partnership, you know, I think the  
23 Trustee should win, and Trustee's probably going to win, get  
24 a judgment. But that's not the case here, Judge, because  
25 again, it's a question of when the obligation arose. And

1 frankly, there's no -- there's nothing to support -- there's  
2 nothing given to -- that you've heard from the Trustee to  
3 support Trustee's position that an obligation of a limited  
4 partnership -- sorry, of a Florida limited partnership,  
5 which I don't think really matters in Florida, but again,  
6 it's a Florida limited partnership. You haven't heard  
7 anything to support the Trustee's position that an  
8 obligation of a Florida limited partnership arises upon the  
9 receipt of fraudulent transfers.

10 And again, I provided the Court with case law from  
11 other -- there's a New York -- I mean, New York -- a New  
12 York State case and a Supreme Court of Missouri case that  
13 I'm not going to regurgitate, but that discusses -- and  
14 which makes sense, Judge, that until there's a default under  
15 a lease when there's actually, you know, a right to sue,  
16 that's when an obligation arises. It's just -- for  
17 instance, if you sign a lease -- if the general partnership  
18 signs a lease and keeps paying a lease, there's no defaults.

19 So, it's akin to this case, Judge, where an  
20 obligation -- there needs to be an obligation. There's no  
21 evidence that this receipt of a fraudulent transfer was  
22 listed as a liability on the limited partnership's books.  
23 You haven't heard that, and it wasn't. But how -- because  
24 how could it be, Judge? Using common sense, you receive  
25 money -- the general partnership receives money in

1       repayment, and it turns out, what, two years later or  
2       however long, it turns out it's a fraudulent transfer. This  
3       was a big, massive Ponzi scheme.

4               So, there's no way that's an obligation. You have  
5       to look at it through the general partnership -- the general  
6       partners' perspective and the limited partnership's  
7       perspective with regards to, you know, imposing liability on  
8       a general partnership. Again, we're not a general partner.  
9       We're not talking about liability of the initial transferee  
10      because the initial transferee was not my client. The  
11      initial transferee was the limited partnership. So  
12      hopefully I've made my point, Judge. I don't want to beat a  
13      dead horse.

14             THE COURT: Very good.

15             MR. ROHER: Okay. And with regards to -- as -- my  
16      client -- we filed -- my client filed an affidavit, again,  
17      that states that he I guess informally dissociated once the  
18      -- his -- the divorce proceedings were initiated by Wendy  
19      Brown. And so that, I believe, creates an issue of material  
20      fact in response to the Trustee's Motion for Summary  
21      Judgment.

22             And two minor points, Judge, but I think they're  
23      worth noting. Again, and this is response -- in response.  
24      In response to the Trustee's request for summary judgment  
25      being entered, I have a pending Motion to Compel Discovery

1 Docket Entry 173 against Wendy Brown because I served  
2 discovery prior to the discovery cut off that was never  
3 responded to. And also, if you look at Docket Entry 209-2,  
4 Judge, which is the deposition transcript of -- filed of  
5 Wendy Brown, 209-2, Page 130, there was an agreement on the  
6 record, Judge, at the conclusion of the Trustee's deposition  
7 of Ms. Brown.

8 And I cross-noticed it, and I wanted to ask  
9 questions, but I didn't want to ask questions without the  
10 documents. I didn't want to ask questions until I got the  
11 documents. So, there was an agreement on the record to  
12 renote the deposition once I got the documents. I've  
13 still never gotten the documents. I didn't have the chance  
14 to depose the co-Defendant and representative -- and the  
15 representative of the limited partnership.

16 Between that deposition and today, because you're  
17 -- this was in early 2020, between that and today, we -- the  
18 parties engaged in substantial and very -- the most lengthy  
19 settlement discussions I've ever had in any case, which took  
20 place over a period of months. So, I did not push the  
21 matter because I was very hopeful we could settle. And  
22 also, that was intervening COVID. So, I did file a Motion  
23 to Compel the documents from -- that were promised to me by  
24 Mr. Burnfeld on the record if you want to look at Page 130.

25 And strangely, the Trustee took issue with that

1 after agreeing to that -- after agreeing to let me ask  
2 questions once I got documents, the Trustee filed a response  
3 in opposition to that request. So, in the interest of  
4 fairness, Judge, I -- it's just -- there's outstanding  
5 discovery that precludes the entry of summary judgment in  
6 favor of the Trustee. So that's really -- that's -- outside  
7 of -- I don't want to -- you know, I don't want to  
8 regurgitate it -- things in -- the matters in response. I  
9 know we've been arguing for a long time, so I'll stick by my  
10 papers. But again, I think at this point, summary judgment  
11 is improper due to the discovery being outstanding. And  
12 there's -- there are genuine issues of material fact raised  
13 in the affidavit.

14 THE COURT: Mr. Lambe, anything you wish to add?

15 MR. LAMBE: Yes, Your Honor. Just a few brief  
16 points. When the customer property was transferred to Ken  
17 Wen, the claim arises under SIPA Section 78fff(2)(c)(3),  
18 which is -- renders this case a little bit different because  
19 of the SIPA overlay. Florida Law can't pre-empt or  
20 supersede SIPA given its fundamental goals.

21 Also, the liability of Ken Wen was fixed as of the  
22 petition date, which was December 11, 2008, which was within  
23 two years of the dissociation, and BLMIS had no notice of  
24 the dissociation as of the petition date. There is no  
25 evidence that suggests that.

1           At the outset of this hearing, Your Honor, Mr.  
2       Roher stated that there is no genuine dispute that Mr. Brown  
3       dissociated from Ken Wen on February 29, 2008. Now we're  
4       hearing that there is somehow a dispute of genuine fact here  
5       or a genuine dispute of material fact based on the  
6       affidavit. Your Honor, I would submit to the Court that  
7       this is a, you know, a last-minute effort that was raised  
8       only in summary judgment and only in response to the  
9       Trustee's Cross-Motion for Summary Judgment. He's signed  
10      documents as general partner of Ken Wen. He submitted  
11      transfer requests to BLMIS as general partner of Ken Wen,  
12      which are -- can be seen in the Neiburg declaration,  
13      Exhibits 5, 17, and 19.

14           Even the documents that are attached to Mr.  
15      Brown's reply contradict this. In Exhibit C, which is the  
16      Affidavit of Partnership submitted by Wendy Brown, it states  
17      that the dissociation took place as of the effective date,  
18      which was in February of 2008. Similarly, in the Agreement  
19      of Partners, which is attached as Exhibit D to Mr. Brown's  
20      Motion for Summary Judgment, it states that Mr. Brown was  
21      relinquishing his interest as a general partner in Ken Wen  
22      as of February 29, 2008. Any attempt to argue otherwise,  
23      Your Honor, is disingenuous and is not supported by any  
24      evidence whatsoever other than Mr. Brown's self-serving  
25      affidavit. And just --



1 THE COURT: You said some -- go ahead, Mr. Lambe.

2 MR. LAMBE: I'm sorry. Go ahead, Your Honor.

3 THE COURT: No, no. Finish.

4 MR. LAMBE: Okay. And then just finally, Mr.

5 Roher had discussed outstanding discovery. The only thing I

6 could say with regard to that, Your Honor, is on December

7 30th of 2019, Mr. Moore -- Mr. Roher -- excuse me, Mr. Brown

8 did move to extend the fact discovery deadlines. However,

9 on February 5th of 2020, this Court denied that Motion to

10 Extend Fact Discovery. We're well beyond the point here,

11 Your Honor, and you know, to the extent anything else is

12 required, the Trustee would rely on its papers.

13 THE COURT: Okay. I want to rehear you again on

14 78fff(2)(c)(3). You just said something, and you began, and

15 it was you're moving to recover fraudulent transfers against

16 the Defendant. And you're saying that -- tell me what you

17 said.

18 MR. LAMBE: Sure, Your Honor. Basically, just

19 that once the claim arises under SIPA, under that Section of

20 SIPA 78fff --

21 THE COURT: And when does that claim arise under

22 SIPA? That's what I wanted -- I thought you were going to

23 say.

24 MR. CREMONA: Your Honor, if I may interject, this

25 is Nicholas Cremona of Baker and Hostetler also appearing on

1       behalf of the Trustee. If I could just field this question  
2       if that's acceptable to the Court?

3               THE COURT: Right. Please.

4               MR. CREMONA: Your Honor, I think what my  
5       colleague --

6               THE COURT: I think you're conflicted out of this,  
7       though, aren't you? No, you're not.

8               MR. CREMONA: Yeah. Right. I was just going to  
9       explain.

10              THE COURT: Okay.

11              MR. CREMONA: We were previously. There was an  
12       issue, but we are not.

13              THE COURT: Okay.

14              MR. CREMONA: So, Your Honor, sorry to interject,  
15       but I think the point is that as my colleague Mr. Lambe was  
16       saying, this case is very different because of the SIPA  
17       overlay. SIPA Section 78fff(2)(c)(3) deals with the  
18       transfer of customer property, which is very unique to our  
19       case. And at the moment that that customer property is  
20       transferred out of the estate, it becomes recoverable  
21       wherever it may lie by the Trustee.

22              And that, I think, is what Mr. Lambe is saying.  
23       That at that moment in time when those funds are transferred  
24       from BLMIS to any other entity, that gives rise to the  
25       liability because that is -- that money was stolen from

1 other customers in this case and transferred to someone  
2 else. And that's when the claim arises. And there is no  
3 way that a Florida statute could any way pre-empt the  
4 application of that section of SIPA.

5 THE COURT: Okay, but here's the -- here's where I  
6 need clarification. That's to Ken Wen. What about the  
7 partners of Ken Wen? Remember -- let me just say right now,  
8 you have a default on Ken Wen. I expect you to file the  
9 notice of default and then file the judgment of default  
10 against Ken Wen. So that's to Ken Wen. What about to the  
11 partners of Ken Wen? And does Florida law -- and I know  
12 Section 3 is what you all are arguing kick in then. What I  
13 heard him say was SIPA. So, you have a --

14 MR. CREMONA: I think -- I'm sorry to interrupt,  
15 Your Honor, but I --

16 THE COURT: Wait a minute. They filed an answer.  
17 Ken Wen filed an answer, so there is no default. You've got  
18 to file -- did they file a default -- an answer to the  
19 summary judgment? They filed an answer in the case, so we  
20 have to move forward.

21 MR. NEIBURG: Yeah, Your Honor. I'm sorry.  
22 Michael Neiburg on behalf of the Trustee.

23 THE COURT: Yes, please.

24 MR. NEIBURG: Ken Wen filed an answer to the  
25 amended complaint.

1 THE COURT: Right.

2 MR. NEIBURG: Ken Wen did not respond to the  
3 Trustee's Motion for Summary Judgment as to Ken Wen.

4 THE COURT: Oh, say so I grant the summary  
5 judgment motion because no response has been filed with  
6 that.

7 MR. NEIBURG: Correct. And as set forth in the  
8 paper and in prior cases, the Trustee has proved his prima  
9 facie case against Ken Wen.

10 THE COURT: Okay.

11 MR. NEIBURG: And Your Honor two -- I was just --

12 THE COURT: So, let me just --

13 MR. NEIBURG: Sorry, Your Honor.

14 THE COURT: I just want to clarify that up --  
15 clarify that because I want that put to bed. So there has  
16 been no answer filed to the summary judgment, so I'm  
17 granting the summary judgment against Ken Wen, and I expect  
18 you to file an order to that.

19 MR. NEIBURG: Thank you, Your Honor.

20 THE COURT: Do I hear any opposition to that?

21 Having heard none, please do so. Okay. So that's put to  
22 bed. We now know that Ken Wen has a summary judgment  
23 against him. Now then, tell me what you're saying  
24 otherwise.

25 MR. NEIBURG: Your Honor, to answer your question,

1 fundamentally, Mr. Brown is arguing that there was no debt  
2 or obligation on the part of Ken Wen at the time of the time  
3 of the transfers. I think Mr. Cremona just argued that  
4 under SIPA, because customer property was transferred on  
5 those transfer dates, Ken Wen in fact had a debt or  
6 obligation at the time of the transfers because it received  
7 elicited customer property. Florida law says a general  
8 partner will be liable for the debts of a limited  
9 partnership.

10 Since Mr. Brown, for the first three transfers  
11 that we walked through, was a general partner at the time  
12 Ken Wen received customer property, he is liable as a  
13 general partner for the debts of Ken Wen on those dates. As  
14 to the fourth transfer that occurred after Mr. Brown's  
15 alleged February 29, 2008 dissociation, the exception that's  
16 put forth that Mr. Lambe walked through does not apply  
17 because it's less than two years from dissociation, did not  
18 result in the dissolution of Ken Wen, and BLMIS had no  
19 notice.

20 THE COURT: Okay. Well, then let me just say  
21 something to you. It's the In re Nelson case, which is  
22 Bankruptcy Eastern District of Pennsylvania basically. The  
23 claims could not have been asserted prior to the filing of  
24 the SIPA case, and therefore the commencement of the SIPA  
25 case is the date when the fraudulent transfer claims become

1 a liability of the partnership, and that's what's being  
2 argued.

3 MR. NEIBURG: Well, I think to that, Your Honor,  
4 the fallback position of the Trustee would be, even assuming  
5 that reasoning's correct that Ken Wen's liability did not  
6 accrue until the petition date, the Florida statute that Mr.  
7 Brown's counsel raised says -- and I think Mr. Lambe pointed  
8 out the first section, the dissociation in and of itself  
9 does not obviate liability on part of the general partner.

10 THE COURT: Okay.

11 MR. NEIBURG: And because the --

12 THE COURT: Go ahead.

13 MR. NEIBURG: I'm sorry. I was just going to say  
14 because the dissociation and the petition date were less  
15 than two years, if somehow Your Honor rules that the  
16 liability of Ken Wen did not accrue until the petition date,  
17 which I think we said was December 11, 2008, because Mr.  
18 Brown's dissociation occurred within that two-year period  
19 and BLMS had no notice, he's still liable for the debts of  
20 the --

21 THE COURT: Okay.

22 MR. NEIBURG: -- limited partnership.

23 THE COURT: What I haven't had is -- I know you  
24 all have argued Section 3 in Florida law of that 06 whatever  
25 -- .06 whatever, but Mr. Cremona, you're saying -- and I

1 want to be clear on this, does SIPA have a section when the  
2 customer property arises? The customer property -- the --  
3 when the fraudulent transfer occurred.

4 MR. CREMONA: Well, Your Honor --

5 THE COURT: And that's what you were saying,  
6 correct?

7 MR. CREMONA: Yes, Your Honor. Nicholas Cremona  
8 again on behalf of the Trustee. The moment that the funds  
9 are entrusted with the broker, they become customer property  
10 within the meaning of SIPA. I believe the Trustee has  
11 standing to recover that customer property the moment that  
12 it's transferred to a third party --

13 THE COURT: And did you --

14 MR. CREMONA: -- which is covered by Section  
15 78fff(2)(c)(3). And that -- my point is that at that moment  
16 in time, the claim arises under that section.

17 THE COURT: Okay. What you've basically said is  
18 it's under -- and I think is a quote from your papers --  
19 Section 548(a)(1)(A), 550(a), 551 of the Code 78fff(1)(a)  
20 and 78fff(2)(c)(3) of SIPA. So, you're strictly with the  
21 Code Section of either Bankruptcy or SIPA. So, we didn't  
22 have any -- you didn't file anything else in your papers  
23 except that one section of when the -- that one statement of  
24 when the customer property became part of the SIPA action.  
25 Is that correct?

1 MR. CREMONA: I think that's correct, Your Honor.  
2 And for the reasons that Mr. Neiburg said, I think then what  
3 flows from that is that the property is recoverable for the  
4 reasons he said.

5 THE COURT: You seem pretty adamant about what  
6 SIPA says, and all we have simply is a Code section.

7 MR. CREMONA: Yes, Your Honor. I think the  
8 section -- I think it speaks for itself. I know it's quoted  
9 in the papers.

10 THE COURT: Okay. All right. Anything else  
11 anyone wishes to add?

12 MR. ROHER: Just --

13 THE COURT: Yes, sir.

14 MR. ROHER: -- again, I appreciate the three  
15 attorneys ganging up on me.

16 THE COURT: Yeah, I noticed that too, Mr. Roher.

17 MR. ROHER: But I think Mr. Lambe was --

18 THE COURT: What you did not add were highly  
19 sophisticated attorneys. Just so you...

20 MR. ROHER: Oh, I'm sorry. Highly sophisticated,  
21 although I think Mr. Lambe was doing a fine job. But again,  
22 Judge, and again, I think they're not -- that it's clear  
23 that the Trustee can't answer or make -- or justify or make  
24 the distinction here. Again, you just entered summary  
25 judgment in favor of the Trustee against the limited



1 partnership, but that's not the issue here, Judge.

2 The issue is they -- you can't just -- the issue  
3 isn't SIPA. The issue isn't -- the issue is when did that  
4 obligation of the limited partnership occur. I mean,  
5 there's -- that's -- that -- with regards to my client,  
6 that's the issue, Judge. And just because SIPA says --  
7 whatever SIPA says that upon the transfer, that's related  
8 directly to the initial transferee, the general partnership  
9 here. My client was not the initial transferee, was not  
10 even the subsequent transferee.

11 There -- the Trustee can't have their cake and eat  
12 it too. Trustee can't look to Florida law and -- but when  
13 that doesn't make sense look to SIPA law and vice versa.  
14 The Trustee can't talk out of six sides of their mouths.  
15 So, Your Honor, again, I think you've picked up on the issue  
16 here that this isn't your simple straightforward case of  
17 avoiding a fraudulent transfer against an initial  
18 transferee.

19 This -- you have to look to Florida law, and  
20 there's no way you can read -- respectfully, I don't believe  
21 there's any way you can read an obligation arising upon the  
22 receipt of a fraudulent transfer. And I've provided -- I  
23 actually did provide case law, Judge, that supports my  
24 position with regards to lease obligations, which I think  
25 you can look to as justification for, you know, denying

1 summary judgment -- denying Trustee's summary judgment.

2 Or again, Judge, there -- if not for that, there's  
3 discovery that's outstanding. And again, there was an  
4 agreement on the record, and I know Mr. Lambe didn't agree,  
5 but I had an agreement with Mr. Lambe's predecessor, and I  
6 waived my right -- or I waived my right to -- or I agreed  
7 not to go forward that day and waste everyone's time taking  
8 Ms. Brown's deposition because I didn't get the document  
9 requests. And I still haven't gotten the document requests,  
10 and I would've asked various questions that I believe  
11 answers of which could be useful in defeating summary  
12 judgment that I haven't had the opportunity.

13 THE COURT: Very good. Anybody else wish to add  
14 anything else? I will issue a written opinion.

15 MAN 3: Am I allowed to speak?

16 MR. ROHER: No, no. No.

17 MAN 3: Okay.

18 THE COURT: Thank you. Thank you.

19 MR. ROHER: May I be excused, Judge?

20 THE COURT: Yes, you may.

21 MR. ROHER: Thank you, Your Honor. Thank you so  
22 much for all your time. I really appreciate it.

23 THE COURT: Very good. Well, I appreciate it too.

24 MR. LAMBE: Thank you, Your Honor.

25 THE COURT: Very good. Chambers.

1 (Whereupon these proceedings were concluded at  
2 12:08 PM)  
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**I N D E X**

**RULINGS**

**Page Line**

**Motion for Summary Judgement Granted**

**83**

**17**

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

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Mineola, NY 11501

Date: February 24, 2022

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